No. 99-1185-CFH Title: Mark Seling, Superintendent, Special Commitment Center, Petitioner
v.
Andre Brigham Young

Docketed:
January 18, 2000 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Nov 29 1999	Application (99A454) to extend the time to file a petition for a writ of certiorari from December 15, 1999 to January 14, 2000, submitted to Justice O'Connor.
	Nov 30 1999	Application (99A454) granted by Justice O'Connor extending the time to file until January 14, 2000.
	Jan 14 2000	Petition for writ of certiorari filed. (Response due February 17, 2000)
	Jan 14 2000	Appendix of petitioner Mark Seling filed.
	Feb 17 2000	Brief amici curiae of Kansas, et al. filed.
	Feb 17 2000	Brief of respondent Andre Young in opposition filed.
	Feb 17 2000	Appendix of respondent filed.
	Feb 17 2000	Motion of respondent for leave to proceed in forma pauperis filed.
	Feb 23 2000	DISTRIBUTED for Conference of March 17, 2000
	Feb 28 2000	Reply brief of petitioner Mark Seling filed.
	Mar 16 2000	Letter and material in the Campbell case received from counsel for the petiioner and distributed.
	Mar 20 2000	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Mar 20 2000	Petition GRANTED. SET FOR ARGUMENT October 31, 2000. **********
	May 25 2000	Joint appendix filed.
	May 25 2000	Brief of petitioner Mark Seling, Superintendent filed.
	May 25 2000	LODGING consisting of twenty bound copies of lower court material submitted by counsel for the petitioner.
	May 25 2000	Brief amici curiae of Kansas, et al. filed.
	Jul 7 2000	Brief of respondent Andre Brigham Young filed.
	Jul 7 2000	Brief amicus curiae of California Atascadero State Hospital Sect. 6600 Civil Comm. filed.
	Jul 10 2000	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Aug 7 2000	Reply brief of petitioner Mark Seling filed.
	Aug 10 2000	LODGING consisting of twenty bound copies related material submitted by counsel for the petitioner.
	Aug 31 2000	Record filed.
	Sep 8 2000	Letter from respondent Andre Young received and distributed.
	Sep 13 2000	Record filed.
	Sep 22 2000	CIRCULATED.
	Oct 13 2000	Supplemental brief of respondent filed.
	Oct 31 2000	ARGUED.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARK SELING, Superintendent,
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), this Court held that the Kansas law authorizing commitment of sexually violent predators is civil in nature and does not violate the double jeopardy or *ex post facto* clauses. The Kansas law was modeled on Washington's Sexually Violent Predator Statute and the two laws are substantially similar. This case presents the following question regarding Washington's Sexually Violent Predator Statute:

Whether an otherwise valid civil statute can be divested of its civil nature and held to violate the double jeopardy and *ex post facto* clauses because the administrative agency operating the commitment facility fails to provide for treatment and other conditions of confinement mandated by statute at some time during the individual's commitment.

LIST OF PARTIES

The parties to the proceeding below were:

Petitioner: David Weston was the Respondent-Appellee below. Mr. Weston was the Superintendent of the Special Commitment Center when this matter was originally filed. Mark Seling is Mr. Weston's successor and the current Superintendent of the Special Commitment Center.

Respondent: Andre Brigham Young was the Petitioner-Appellant below.

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PETITION FOR A WRIT OF CERTIORARI

Mark Seling, Superintendent, Special Commitment Center (SCC), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's Order Amending Opinion and Denying Rehearing and Amended Opinion is reported at 192 F.3d 870 (9th Cir. 1999). App. at 1a-13a. The order of the district court is unpublished. App. at 15a-27a. The opinion of the Washington Supreme Court is reported at 122 Wash. 2d 1, 857 P.2d 989 (1993). App. 28a-102a.

JURISDICTION

The judgment of the Ninth Circuit was entered on May 20, 1999. On September 16, 1999, in response to a timely motion for rehearing en banc, the Court of Appeals issued an Order Amending Opinion and Denying Rehearing and Amended Opinion. On November 30, 1999, Justice O'Connor granted an extension of time in which to file a petition for a writ of certiorari to and including January 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The *Ex Post Facto* Clause of Article 1, Section 10, provides that "[n]o State shall . . . pass any ex post facto Law . . . ."

The provisions of Washington's Sexually Violent Predator Statute (Statute), Wash. Rev. Code 71.09, as it existed when Respondent was committed, are set forth in the Appendix at pages 103a-110a. The Statute was amended in

1995 and the current version of the law is set forth in the Appendix at pages 112a-135a.

STATEMENT OF CASE

This case concerns a challenge to Washington's Sexually Violent Predator Statute which authorizes the civil commitment of sexually violent predators. The basis for the challenge is Respondent's claim that the law, as applied to him, is punitive and, therefore, violates the *ex post facto* and double jeopardy clauses of the Constitution.

A. Legal Background

1. Washington's Sexually Violent Predator Statute

A "sexually violent predator" is a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility". Wash. Rev. Code § 71.09.020(1) (1998)[1], App. at 114a.

Under the Statute, the county prosecutor (or Attorney General acting on the prosecutor's behalf) may file a petition in superior court alleging that a person is a sexually violent predator. Wash. Rev. Code § 71.09.030, App. at 117a. Within 72 hours of the petition's filing, a hearing is held to determine whether there is probable cause to detain the person pending trial. Wash. Rev. Code § 71.09.040(2), App. at 118a. The Statute provides for a right to trial within 45 days of the probable cause determination. Wash. Rev. Code § 71.09.050(1), App. at 119a.

Throughout the trial proceedings, the detained person is entitled to counsel and to have qualified "experts or

[1]We cite to the current version of the Statute (App. at 112a-135a), except as otherwise indicated.

professional persons" perform an evaluation on his or her behalf. Wash. Rev. Code § 71.09.050(2), App. at 119a. The Statute allows for trial by jury, which must be unanimous in its finding. Wash. Rev. Code §§ 71.09.050(3), .060(1), App. at 120a-121a. At trial, the State must prove beyond a reasonable doubt that the person is a sexually violent predator. Wash. Rev. Code § 71.09.060(1), App. at 120a.

If the jury finds the person to be a sexually violent predator, he or she is then committed indefinitely to the custody of the Department of Social and Health Services (DSHS) "for care, control and treatment". Wash. Rev. Code § 71.09.060(1), App. at 120a.[2] Although the person has been involuntarily committed, the Statute provides:

> "Any person subjected to restricted liberty as a sexually violent predator pursuant to this chapter shall not forfeit any legal right or suffer any legal disability as a consequence of any actions taken or orders made, other than as specifically provided in this chapter." Wash. Rev. Code § 71.09.080(1), App. at 122a.

The Statute also requires that "*any person committed pursuant to this chapter has the right to adequate care and individualized treatment*". Wash. Rev. Code § 71.09.080(2), App. at 122a (emphasis added).[3]

[2] Each year, the Secretary of DSHS is required to undertake a current examination of the person's mental condition, danger to reoffend in a sexually violent manner, and amenability to treatment in a less restrictive setting than total confinement. This report is provided to the court and the person committed. Wash. Rev. Code § 71.09.070, App. at 122a. There is an annual judicial review of the commitment, and a person committed as a sexually violent predator may petition the court for an unconditional discharge or for conditional release to a less restrictive alternative. Wash. Rev. Code § 71.09.090, App. at 124a-125a.

[3] The requirement for adequate care and individual treatment in the current version of the Act carries over from the original law that required

2. *Kansas v. Hendricks*

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), this Court considered a claim that the sexually violent predator law adopted by the state of Kansas violated the double jeopardy and *ex post facto* clauses of the Constitution. The Kansas law was modeled after Washington's Sexually Violent Predator Statute. *Hendricks*, 521 U.S. at 387 (Breyer, J., dissenting). The thrust of the claim was that the Kansas law "establishes a criminal proceeding; hence confinement under it necessarily constitutes punishment". *Id.* at 361.

The Court rejected this claim. The Court began its analysis by noting that the "characterization of a particular proceeding as civil or criminal is first of all a question of statutory construction". *Id.* (internal quotation marks omitted). In *Hendricks*, the Court concluded that "[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm." *Id.* The Court went on to explain "we will reject the legislature's manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil". *Id.* (internal quotation marks and punctuation omitted). After reviewing the Kansas law, the Court concluded that the law "does not establish a criminal proceeding and that involuntary confinement pursuant to the Act is not punitive". *Id.* at 369.

Even though it concluded that the Kansas law was civil, it went on to hold that the law did not violate the double jeopardy and *ex post facto* clauses. With regard to double jeopardy, the question was whether involuntary confinement under the Kansas law, after Mr. Hendricks had already served a criminal sentence, amounted to a "second punishment for the

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that "the involuntary detention or commitment of persons under this chapter shall conform to constitutional requirements for care and treatment". Wash. Rev. Code § 71.09.080 (1990), App. at 109a.

same offense". *Id.* The Court concluded it did not because a proceeding under the Kansas law "does not define an 'offense,' the elements of which can be compared to the elements of an offense for which the person may previously have been convicted". *Id.* at 370. Any prior conviction is used "for evidentiary purposes to determine whether a person suffers from a 'mental abnormality' or 'personality disorder' and also poses a threat to the public". *Id.*

With regard to the *Ex Post Facto* Clause, the question was whether the Kansas law applied a new punitive measure to a crime already consummated. *Id.* The Court ruled there was no violation of the *Ex Post Facto* Clause because the Kansas law did "not have retroactive effect". *Id.* at 371. "To the extent that past behavior is taken into account it is used . . . solely for evidentiary purposes." *Id.*

3. *Hudson v. United States*

In *Hudson v. United States*, 522 U.S. 93 (1997), the Court again confronted the question of whether a proceeding was civil or criminal. In *Hudson*, the defendant claimed that the government's imposition of monetary sanctions following a criminal indictment violated the Double Jeopardy Clause, because the monetary sanction was based on the same conduct for which the defendant had previously been indicted. The issue before the Court was whether the subsequent administrative proceeding was civil or criminal. *Hudson*, 522 U.S. at 95.

The Court began with the reasoning it had applied in *Hendricks*. "Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction." *Id.* at 99. If the legislature has expressed an intent to create a civil penalty, the Court inquires further "whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty". *Id.* (citations omitted) (internal punctuation omitted). The factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), provide useful

guideposts. *Hudson*, 522 U.S. at 100. However, "*these factors must be considered in relation to the statute on its face*". *Id.* (emphasis added). Further, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty". *Id.* (citation omitted) (internal punctuation omitted).

In *Hudson*, the Court "disavow[ed] the method of analysis used in *United States v. Halper*, 490 U.S. 435 (1989)". *Hudson*, 522 U.S. at 95. *Halper* deviated from traditional double jeopardy doctrine because the Court focused "on the character of the actual sanction imposed, rather than, as *Kennedy* demanded, *evaluating the statue on its face* to determine whether it provided for what amounted to a criminal sanction". *Id.* at 101 (emphasis added) (citations omitted) (internal punctuation omitted).

In reviewing the monetary penalty, the Court concluded that the legislature intended to create a civil remedy and that applying the *Kennedy* factors to the statute, on its face, did not overcome that legislative declaration. *Id.* at 104-05.

B. Procedural History

1. Proceedings In State Court

One day prior to his release from prison for his most recent rape conviction, the State filed a petition under the Statute to determine whether Andre Brigham Young was a sexually violent predator. The certification for determination of probable cause referenced two psychological evaluations of Young and his criminal history which included convictions for six violent felony rapes over a thirty-one-year period. After reviewing the petition and supporting certification, the court found probable cause and later scheduled a trial. On March 8, 1991, Young was determined by a unanimous jury to be a sexually violent predator and was committed to DSHS for "care, control and treatment". Young was sent to the Special Commitment Center operated by DSHS.

Young appealed his commitment directly to the Washington Supreme Court, challenging the constitutionality of the Statute on a variety of grounds, including *ex post facto* and double jeopardy. In August 1993, the court upheld the constitutionality of Washington State's Sexually Violent Predator Statute in *In re Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993). *See* App. at 28a. The court rejected Young's *ex post facto* and double jeopardy challenges because "[b]oth the language of the Statute and the legislative history evidence a clear intent to create a civil scheme." App. at 38a. The court then applied the *Kennedy* factors and concluded that these "factors weigh heavily on the side of finding that this statute is civil". App. at 42a. According to the court, "[t]he Statute before us is primarily concerned with incapacitation and treatment." App. at 42a.

2. Proceedings In The District Court

Following the decision of the Washington Supreme Court, Young filed a petition for writ of habeas corpus in federal district court under 28 U.S.C. § 2254. On August 25, 1995, the federal district court for the Western District of Washington held the Statute unconstitutional on *ex post facto*, double jeopardy, and substantive due process grounds, but stayed Young's release. The State appealed to the Ninth Circuit. After issuance of this Court's decision in *Kansas v. Hendricks*, the Ninth Circuit entered an order remanding this case to the district court for reconsideration in light of *Hendricks*.

On February 10, 1998, the district court dismissed Young's petition, upholding the Statute's constitutionality under *Hendricks* and rejecting all of Young's claims. App. at 15a-27a.

3. Proceedings In The Ninth Circuit

Young appealed to the Ninth Circuit which reversed the district court. Initially the Ninth Circuit determined that, because the Kansas Act "was modeled on and is substantially

similar to the Washington statute, *Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses". App. at 6a-7a.

Nonetheless, the court reasoned that "*Hendricks* did not preclude the possibility that the Washington statute, *as applied*, is punitive. . . . And, following the dictates of *Hendricks*, we look to the *conditions* of Young's confinement when we make that determination". App. at 7a.

The court rejected the State's argument that *Hudson* precluded consideration of actual conditions of confinement when undertaking a double jeopardy and *ex post facto* analysis because the "purpose and effect" inquiry under the Double Jeopardy Clause must be conducted "*in relation to the statute on its face*", and not with regard to the sanction imposed in any particular case. *Hudson*, 522 U.S. at 99-100, 116 (emphasis added). In a footnote, the Ninth Circuit purported to distinguish *Hudson* as involving "monetary penalties and occupational disbarment", whereas "this case involves confinement". App. at 7a n.4. Citing to *Hendricks*, *Allen v. Illinois*, 478 U.S. 364, 373-74 (1986), and *Bell v. Wolfish*, 441 U.S. 520, 535-39 (1979), the Ninth Circuit asserted that "the Supreme Court has always looked to the actual conditions of confinement in cases considering the question of whether confinement is criminal or civil". App. at 7a n.4.

The Ninth Circuit determined that Young had alleged facts which, if proved, would establish the punitive nature of his confinement and would entitle him to relief.[4] Because the Ninth Circuit determined that the Washington state courts had not afforded Young a full and fair hearing on that issue, the court remanded the case for an evidentiary hearing on the *ex post facto* and double jeopardy clause claims.

[4] Although the court did not specify precisely the nature of the relief to which Young might be entitled, Young has consistently maintained that he is entitled to release.

The Ninth Circuit did not address this Court's conclusion in *Hendricks* that the Kansas law (and the Washington law upon which it was modeled) did not violate the Double Jeopardy Clause because commitment as a sexually violent predator did not involve the same offense for which a predator may have been punished. Nor did the Ninth Circuit address the holding in *Hendricks* that there was no violation of the *Ex Post Facto* Clause because the law was not retroactive, in that prior behavior was taken into account for evidentiary purposes only.

The State filed a timely petition for rehearing en banc which was denied.

REASONS FOR GRANTING THE PETITION

There are three important reasons to grant the petition. First, the Ninth Circuit's decision directly conflicts with the decision of the Washington Supreme Court in *In re the Detention of Turay*, 139 Wash. 2d 379, 986 P.2d 790 (1999), which specifically rejects the Ninth Circuit's "as applied" analysis. This clear conflict between the Ninth Circuit and the Washington Supreme Court creates the intolerable situation in which the same litigant bringing the same claim will receive one answer in federal court and an entirely different answer in state court. This confusion can only be resolved by a decision of the United States Supreme Court.

Second, the conflict between the Ninth Circuit and the Washington Supreme Court has broader implications. In *Hendricks*, this Court upheld the constitutionality of commitment laws for sexually violent predators, such as that adopted by Kansas. In *Hudson*, this Court disavowed *Halper* and held that a court must analyze a statute on its face in determining whether it is civil or criminal. The Ninth Circuit departs from these holdings to look at actual conditions of confinement. For Young and all other civilly committed individuals across the country, the "as applied" double jeopardy and *ex post facto* doctrine announced by the Ninth

Circuit reopens issues settled by this Court in *Hendricks* and *Hudson*.

Third, the Ninth Circuit's decision directly conflicts with the holding in *Hendricks* that the double jeopardy and *ex post facto* clauses are not violated because sex predator laws, like those in Kansas and Washington, do not operate retroactively and do not involve the same offense for which a predator may have previously been convicted.

A. The Ninth Circuit's Decision Conflicts With The Washington Supreme Court's Decision

Roughly one month after the Ninth Circuit's decision in this case, the Washington Supreme Court decided *In re Turay*. Turay was found by a jury to be a sexually violent predator and appealed his commitment order challenging the constitutionality of the Statute. Turay claimed that "conditions at the [Special Commitment Center] are punitive and thereby render RCW 71.09 a criminal statute 'as applied' to him, and thus violative of the double jeopardy clause". *In re Turay*, 986 P.2d at 809. Turay's allegations of punitive conditions and inadequate treatment were identical to the allegations considered by the Ninth Circuit.[5]

Acknowledging that Turay's argument had been recently accepted by the Ninth Circuit in this case, the Washington Supreme Court expressly refused to follow the Ninth Circuit's decision:

> "We are not unmindful of the fact that the Ninth Circuit Court of Appeals has recently held that *Hendricks* 'does not preclude the possibility that the Washington [SVP] statute, as applied, is punitive.' . . . *This court is, of course, not bound by that decision and, for the aforementioned reasons, we decline to follow it.*" *Id.* at 812 (emphasis added).

[5] Indeed, both Turay's and Young's allegations arose out of claims made in connection with Turay's 42 U.S.C. § 1983 lawsuit which is currently pending in federal district court for the Western District of Washington. *Turay v. Seling*, No. C91-664WD. Pursuant to an injunction entered June 6, 1994, the district court has been closely monitoring conditions at the SCC through periodic hearings and orders.

The Washington Supreme Court concluded that Turay's "as applied" double jeopardy challenge to the Statute, based upon the conditions at the Special Commitment Center rather than the language of the Statute, was "flawed". *Id.* at 810. According to the Washington Supreme Court, *Hudson*

> "clearly stands for the proposition that, in performing double jeopardy analysis, *a court must look at the statute on its face* to determine whether it actually provides for a criminal sanction, rather than evaluating the character of the actual sanctions as imposed." *Id.* at 811 (emphasis added).

The Washington Supreme Court also rejected the Ninth Circuit's attempt to distinguish *Hudson* on the basis that *Hudson* involved monetary penalties and occupational disbarment instead of confinement, stating:

> "*We believe that the Supreme Court meant what it said when it mandated in Hudson that, when performing a double jeopardy analysis, statutes must be evaluated on their face rather than assessing the character of the actual sanctions imposed* . . . . In *Hudson*, the Supreme Court expressly stated that while there are several factors which serve as useful guideposts in performing a double jeopardy analysis, none of these factors, including whether the sanction involves an affirmative disability or restraint, should be elevated to

'dispositive status' or 'considered controlling.' *Hudson*, 522 U.S. at 101." *Id.* at 812 n.30 (emphasis added).

The conflict between the Ninth Circuit and the Washington Supreme Court is clear. The Washington court rejected the reasoning in the Ninth Circuit's opinion and refused to follow it. This conflict is significant and requires immediate resolution. When there is a conflict between different circuits or different states, the law within each circuit or state is settled; the only issue then is one of national uniformity. In Washington, however, two courts have issued two completely irreconcilable decisions. By its very nature, civil commitment must proceed in a stable environment. The split between the Ninth Circuit and the Washington Supreme Court imposes a state of confusion which can only be settled by a decision of this Court.[6]

B. The Conflict Between The Ninth Circuit And The Washington Supreme Court Has National Implications That Requires Resolution By The Supreme Court

The conflict between the Ninth Circuit and the Washington Supreme Court turns on a fundamental issue that has significant national implications. The Washington

[6] In the past, this Court has granted review to resolve a conflict between a federal court and a state supreme court over the constitutionality of the state's law. *See Ward v. Illinois*, 431 U.S. 767, 770-771 (1977) ("The Illinois Supreme Court expressly rejected [the] challenge to the constitutionality of the Illinois obscenity statute . . . and we noted probable jurisdiction to resolve a conflict with a decision of a three-judge District Court for the Northern District of Illinois."); *Memorial Hosp. v. Maricopa Cy.*, 415 U.S. 250, 252-253 (1974) ("In a prior three-judge federal court suit against Pinal County, Arizona, the District Court had also declared the residence requirement unconstitutional. . . . Nonetheless, the Arizona Supreme Court upheld the requirement. To resolve the conflict between a federal court and the highest court of the State, we noted probable jurisdiction.").

Supreme Court concluded that this Court "meant what it said when it mandated in *Hudson* that, when performing a double jeopardy analysis, statutes must be evaluated on their face rather than assessing the character of the actual sanctions imposed". *In re Turay*, 986 P.2d at 812 n.30. This is also the approach taken by other courts after *Hudson* both where no confinement is involved (*see, e.g., United States v. Lippert*, 148 F.3d 974, 976 (8th Cir. 1998); *Cole v. U.S. Dept. of Agriculture*, 133 F.3d 803, 806 (11th Cir. 1998); *Powers v. Commonwealth*, 426 Mass. 534, 694 N.E.2d 324, 328 n.9 (1998)), and where the result will be confinement (*see, e.g., New Jersey v. Black*, 153 N.J. 438, 710 A.2d 428, 432 (1998)).

According to the Ninth Circuit, the requirement that a statute be analyzed on its face to determine whether it is civil or criminal does not apply in cases that involve confinement. In such cases, according to the Ninth Circuit, the Court "has always looked to the actual conditions of confinement". App. 7a n.4. The Ninth Circuit's conclusion on this point creates a significant exception to the rule set out in *Hudson*. Allowing an *ex post facto* and double jeopardy challenge to proceed against a sexually violent predator law based solely upon conditions of confinement disrupts this Court's carefully crafted jurisprudence in this area.

The Ninth Circuit's "as applied" exception to *Hudson* is not supported by the Court's decisions and is unworkable in practice. Since the issue of civil commitment of sexually violent predators is national in scope, the Court should grant review to resolve the question.

1. The Decisions Of This Court Do Not Support The Ninth Circuit's Exception To *Hudson*

The Ninth Circuit cites *Hendricks*, *Allen*, and *Bell* to support its "as applied" exception to *Hudson*. App. at 7a n.4. These decisions do not support the Ninth Circuit's analysis.

Contrary to the Ninth Circuit's conclusion, the *Hendricks* majority based its decision on the Kansas statute, not on the actual conditions of Mr. Hendricks' confinement. *Hendricks* addressed facts nearly identical to those assumed by the Ninth Circuit when evaluating Young's allegations. Even when assuming the possibility that Kansas was unconstitutionally withholding available treatment, the *Hendricks* Court based its *ex post facto* and double jeopardy holding on the language of the statute adopted by the legislature:

> "Indeed, *critical language in the Act itself demonstrates that the Secretary* of Social and Rehabilitation Services, under whose custody sexually violent predators are committed, *has an obligation to provide treatment* to individuals like Hendricks. . . . Other of *the Act's* sections echo this obligation to provide treatment for committed persons. . . . Thus, as in *Allen* [*v. Illinois*], 'the State has a statutory obligation to provide care and treatment for [persons adjudged sexually dangerous] designed to effect recovery,' . . . and we may therefore conclude that 'the State has . . . provided for the treatment of those it commits.'" *Hendricks*, 521 U.S. at 367 (emphasis added).

In summarizing its *ex post facto* and double jeopardy civil-versus-criminal analysis, the Supreme Court listed the factors that resulted in its decision:

> "Where the State has 'disavowed any punitive intent'; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent." *Id.* at 368-69.

Thus, consistent with its later-issued opinion in *Hudson*, the *Hendricks* Court limited its *ex post facto* and double jeopardy holdings to an examination of the language of the Kansas Act, rather than the conditions actually experienced by Mr. Hendricks.

The *Allen* decision relied upon by the Ninth Circuit concerned an Illinois law authorizing the civil commitment of sexually dangerous persons. The question before the Court was whether, for Fifth Amendment purposes, Illinois' statute was civil or criminal. As in *Hendricks*, the *Allen* Court's focus was on the statutory language rather than the actual daily conditions of confinement experienced by Allen. Although noting that "it might well be a different case" if petitioners had shown conditions of confinement essentially identical to that of felons, the Court did not remand for additional evidence on the statute "as applied". Instead, the Court looked again to the language of the statute, noting that, "counsel for the State assures us that, *under Illinois law,* sexually dangerous persons must not be treated like ordinary prisoners". *Allen*, 478 U.S. at 374 (emphasis added).[7]

Finally, the Ninth Circuit's citation to *Bell* is inapposite. In *Bell*, pretrial detainees brought a class action suit alleging that deficient conditions of confinement violated their rights to due process. The suit did not raise *ex post facto* or double jeopardy claims. While the Court focused on conditions of confinement, it did so in order to determine whether an injunction should issue in order to change those conditions, not to determine whether the underlying law authorizing pretrial detention was civil or criminal. *Bell*, 441 U.S. at 523-30.

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[7] Similarly, the Washington Supreme Court determined that, *under Washington law*, "the regulations governing the commitment facility specifically provide a wider range of privileges than those associated with a prison setting". *In re Young*, 857 P.2d at 1005.

The Ninth Circuit has essentially created its "as applied" analysis out of whole cloth and misses the point of the "on its face" limitation adopted by *Hudson*. The exclusive focus of a civil-versus-criminal analysis under the *ex post facto* and double jeopardy clauses is the action of the legislative branch in adopting a statute. Intent to create a criminal statute can be inferred from the language of that statute, or it can arise from the "purpose and effect" of the statute, i.e., those practices or actions which naturally and necessarily flow from the language of the statute as enacted by the legislature.

Contrary to the Ninth Circuit's analysis, it does not matter to the double jeopardy analysis whether the civil action involves confinement or some other penalty. With *Halper* overruled, the Double Jeopardy Clause cannot operate as a sliding scale protection depending on the severity of the unlawful punishment. A focus on the actual civil sanction rather than the statutory scheme "flies in the face of the notion that the Double Jeopardy Clause forbids the government from even attempting a second time to punish criminally". *Hudson*, 522 U.S. at 101 (internal citations omitted). After *Hudson*, there is no support for the Ninth Circuit's position that allows double jeopardy and *ex post facto* prohibitions to vary depending upon the nature of the sanction applied in a particular case.

2. The Ninth Circuit's "As Applied" Doctrine Is Unworkable

In this case, the Washington Legislature adopted an involuntary commitment scheme that was civil both in its intent and in its purpose and effect. Even the Ninth Circuit agrees that "*Hendricks* forecloses the claim that the Washington Statute, on its face, violates the *ex post facto* and double jeopardy clauses". App. at 7a. Yet, under the Ninth Circuit's "as applied" doctrine, the law will lose its "civil" status if the actual operation of the Special Commitment

Center is punitive. This "as applied" test is unworkable in two respects.

First, the Ninth Circuit's notion that administrative action can "divest" a statute of its civil nature is particularly troubling. The Washington Statute requires constitutionally adequate treatment for sexual predators. Wash. Rev. Code §§ 71.09.080 (1990), .080(2) (1998), App. at 109a, 122a. Now, many years after passage of the Statute, the Ninth Circuit's "as applied" double jeopardy and *ex post facto* doctrine may operate to "divest" the Statute of its civil intent and purpose through reliance on the actions of an executive branch administrative agency. No other constitutional doctrine operates in this manner -- granting an executive branch agency the power to effectively invalidate a statute through improper administration, which is in violation of the statute's express mandate. The Court should closely question the wisdom of this expansion of executive branch power under the guise of the double jeopardy and *ex post facto* clauses.

Second, it is not clear how the "as applied" test would work in practice since the conditions of confinement may change over time. For example, what happens if treatment at the Special Commitment Center is now proper but was not adequate during Young's first years of his confinement? Double jeopardy protections cannot "attach" and "un-attach" with changes in conditions of confinement. Under the "as applied" approach, the constitutionality of the law may change from year to year, while the original legislative purpose to create a civil commitment law remains the same.

Hudson warns that double jeopardy (and by implication, *ex post facto*) jurisprudence should not be the vehicle for addressing all types of ill:

> "Finally, it should be noted that some of the ills at which *Halper* was directed are addressed by other constitutional provisions. The due process and equal protection clauses

> already protect individuals from sanctions which are downright irrational. . . . The additional protection afforded by extending double jeopardy protections to proceedings heretofore thought to be civil is more than offset by the confusion created by attempting to distinguish between 'punitive' and 'nonpunitive' penalties." *Hudson*, 522 U.S. at 102-03.

A more practical approach to address conditions of confinement was noted by the Washington Supreme Court in *In re Turay*. According to the Washington court, the appropriate remedy for improper conditions of confinement at the Special Commitment Center lies in an action to change the conditions pursuant to 42 U.S.C. § 1983:

> "Turay's remedy for unconstitutional conditions of confinement at the SCC is, therefore, an injunction action and/or an award of damages . . . . Further, the federal court is maintaining a zealous watch over the conditions at SCC to enforce the injunction that it put in place. Accordingly, Turay has an adequate remedy that will guarantee that the conditions at the SCC will meet or exceed constitutional standards." *In re Turay*, 986 P.2d at 812[8]; *see also Youngberg v. Romeo*, 457 U.S. 307 (1982).

---

[8]The Wisconsin Court of Appeals reached a similar conclusion when considering the question of whether deficient conditions at Wisconsin's sexually violent persons treatment facility merited the predator's release:

> "[T]he State argues persuasively that even if Seibert were correct that the center failed to develop a treatment program for his special needs, his conclusion that he should be released would place society at risk for his acts of sexual violence and produces an absurd result. Rather, they argue, his remedy is to litigate that issue and, if successful, obtain appropriate treatment not supervised release. We agree." *State v. Seibert*, 220 Wis. 2d 308, 582 N.W.2d 745, 749, *review denied*, 220 Wis. 2d 366, 585 N.W.2d 158 (1998).

It is not in dispute that Young is statutorily entitled to adequate care and treatment. However, 42 U.S.C. § 1983 provides a remedy to correct any deficiencies. As noted above, such an action is already proceeding in federal district court for the benefit of Mr. Young and others confined there. There is no need to adopt an expanded *ex post facto* and double jeopardy doctrine allowing for a parallel action in habeas corpus.

3. The Conflict Between The Ninth Circuit And The Washington Supreme Court Has National Implications

The conflict between the Ninth Circuit and the Washington Supreme Court over the interpretation of *Hudson* has national implications. Thirteen other states have laws authorizing civil commitment of violent sexual predators.[9] After *Hendricks* and *Hudson*, these laws were civil in nature if the statutes were similar to the Kansas statute upheld in *Hendricks*. The Ninth Circuit's decision casts doubt on the validity of these statutes. Under the "as applied" test, the civil or criminal nature of a law turns on the conditions of confinement at some unspecified time, which may fluctuate over time.

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[9]These states are: Arizona (Ariz. Rev. Stat. §§ 36-3701 – 36-3716), California (Cal. Welf. & Inst. Code § 6600), Florida (Fla. Stat. Ann. Ch. 916.31 – 916.49), Illinois (725 Ill. Comp. Stat. Ann. 207), Iowa (Iowa Code § 229A), Kansas (Kan. Stat. Ann. § 59-29a01 *et seq.*), Minnesota (Minn. Stat. § 253B.185 & 253B.02, subds. 18b & 18c), Missouri (Mo. Rev. Stat. § 632.480), New Jersey (N.J. Rev. Stat. § 30:4-27.26), North Dakota (N.D. Cent. Code § 25-03.3), South Carolina (S.C. Code Ann. § 44-48-10), Texas (Tex. Health & Safety Code Ann. § 841), and Wisconsin (Wis. Stat. Ch. 980).

Further, all 50 states have traditional civil commitment laws. Like sex predator commitments, the mental disorder and dangerousness required for commitment can often be evidenced by prior criminal actions. Such commitment laws are now, under the Ninth Circuit's reasoning, vulnerable to double jeopardy and *ex post facto* challenges based on claims of unconstitutional conditions of confinement. Likewise, "punitive" conditions of confinement could, under the Ninth Circuit's theory, transform regulatory proceedings like parole revocations into a criminal proceeding in violation of the Double Jeopardy Clause. *See generally New Jersey v. Black*, 710 A.2d 428.

The Ninth Circuit's decision will doubtless spawn substantial litigation addressing conditions of confinement under the "as applied" theory.[10] There are, as the law now stands, two lines of conflicting authority to guide courts in interpreting *Hendricks* and *Hudson* on this issue—the Ninth Circuit decision in *Young* and the Washington Supreme Court decision in *In re Turay*. The Court should grant review to resolve this conflict and clarify the law for judging the validity of these laws.

C. The Ninth Circuit's Decision Conflicts With *Hendricks* Because Washington's Statute Neither Involves The "Same Offense" Nor Is Retroactive

In addition to concluding that the Kansas law was civil, *Hendricks* held that Kansas' Sexually Violent Predator Act does not violate the double jeopardy and *ex post facto* clauses due to the absence of the "same offense" and retroactivity requirements. In order to prevent the *ex post facto* and double jeopardy clauses from operating as catch-all

[10] At present, conditions of confinement litigation is pending in several states, including Wisconsin (*see, e.g., West v. Macht*, U.S. Court of Appeals for the Seventh Circuit, Cause No. 99-1169), Illinois (*see, e.g., In re Traynoff*, Kane County, Illinois, Cause No. 98 HR 456), and California (*see, e.g., Hydrick v. Wilson*, C.D. Cal., Cause No. CV 98-7167TJH (RNB).

categories for constitutional relief, this Court has defined the minimum attributes for these claims. By allowing an *ex post facto* and double jeopardy challenge to proceed against a sexually violent predator law based solely upon conditions of confinement, but absent the additional doctrinal requirements identified in *Hendricks*, the Ninth Circuit disrupts this Court's carefully crafted jurisprudence in this area.

1. Washington's Law Does Not Violate The Double Jeopardy Clause Because It Does Not Address The "Same Offense"

The Ninth Circuit assumes that, if Young's confinement is punitive, then the Statute "punishes Young again . . . for the same offense". App. at 6a. This conclusion directly conflicts with *Hendricks*, which held that Kansas' Sexually Violent Predator Act does not implicate the "same offense" prong of the Double Jeopardy Clause:

> "*A proceeding under the Act does not define an 'offense,' the elements of which can be compared to the elements of an offense for which the person may previously have been convicted.* Nor does the Act make commission of a specified 'offense' the basis for invoking the commitment proceedings. *Instead, it uses a prior conviction* (or previously charged conduct) *for evidentiary purposes* to determine whether a person suffers from a 'mental abnormality' or 'personality disorder' and also poses a threat to the public. Accordingly, *we . . . conclude that the Act does not violate the Double Jeopardy Clause.*" *Hendricks*, 521 U.S. at 370 (emphasis added).

The Ninth Circuit decision did not analyze or even mention this holding in *Hendricks*. It is, however, controlling. As with Kansas' Act, commission of a specific offense is relevant for evidentiary purposes, but does not

form the basis of the commitment. The Ninth Circuit's determination to allow Mr. Young's double jeopardy challenge to proceed cannot be reconciled with this holding from *Hendricks* that Kansas' Act, modeled on and in all pertinent respects indistinguishable from Washington's Statute, does not implicate the "same offense".

2. Washington's Law Does Not Violate The *Ex Post Facto* Clause Because It Is Not Retroactive

The Ninth Circuit decision further conflicts with *Hendricks* in its "as applied" *ex post facto* holding. The *Ex Post Facto* Clause comes into play only when the new punishment is retroactive in operation. *Hendricks*, 521 U.S. at 370-71.

Again without analysis, the Ninth Circuit asserts that the Statute "imposes a new punitive measure . . . for crimes [Young] committed before the statute's enactment". App. at 6a. However, *Hendricks* held that Kansas' Act was not retroactive:

> "*Moreover, the Act clearly does not have retroactive effect.* Rather, the Act permits involuntary commitment based upon a determination that the person *currently* both suffers from a 'mental abnormality' or 'personality disorder' and is likely to pose a future danger to the public. *To the extent that past behavior is taken into account, it is used, as noted above, solely for evidentiary purposes.* Because the Act does not criminalize conduct legal before its enactment, nor deprive Hendricks of any defense that was available to him at the time of his crimes, the *Act does not violate the Ex Post Facto Clause.*" *Id.* at 371 (emphasis added).

Once again the Ninth Circuit's decision ignores this holding in *Hendricks*. The holding applies equally to this case since, as is the case with Kansas' law, past behavior is taken into account only for evidentiary purposes.

The Ninth Circuit's decision on these issues is in direct conflict with *Hendricks*. This is not a situation where the Ninth Circuit attempts to distinguish a decision of the Supreme Court, as it did in this case in its discussion of *Hudson*. Instead, the Ninth Circuit simply ignored the holding of this Court in *Hendricks*. By abandoning the requirements of "same offense" and retroactivity, the Ninth Circuit expands these doctrines well beyond the confines recognized by this Court. The Court should grant review to resolve this conflict.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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IN THE
SUPREME COURT OF THE UNITED STATES

MARK SELING, Superintendent,
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDRE BRIGHAM YOUNG,	)	No. 98-35377
	)	D.C. No.
	)	CV-94-00480-JCC
Petitioner-Appellant,	)	
	)	
vs.	)	ORDER
	)	AMENDING
DAVID WESTON,	)	OPINION AND
Superintendent of the Special	)	DENYING
Commitment Center,	)	REHEARING AND
	)	AMENDED
Respondent-Appellee.	)	OPINION
	)	

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
April 14, 1999—Seattle, Washington

Filed May 20, 1999
Amended September 16, 1999

Before: Harry Pregerson and David R. Thompson,
Circuit Judges, and Robert J. Kelleher, District Judge.[1]
Opinion by Judge Pregerson

---

[1]Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that in a federal habeas corpus action, the district court must conduct an evidentiary hearing to determine whether the conditions of confinement at the state mental institution render the state's sexual predator statute punitive as applied to the petitioner.

In federal court, appellant Andre Young sought a writ of habeas corpus. Young was confined indefinitely at the Washington State Special Commitment Center (SCC) under the State's Sexually Violent Predator Statute. His petition alleged that the conditions of his confinement were so onerous and punitive that as applied, the statute violated the Constitution.

The district court granted Young's petition, ruling that on its face, the statute violated the substantive due process provisions of the Due Process Clause because it permits indefinite confinement without a showing of mental illness; the Ex Post Facto Clause because it is punitive and applies retrospectively; and the Double Jeopardy Clause because it imposes additional incarceration on a person who has already been punished for commiting the underlying criminal offense. The State appealed.

While the appeal was pending, the Supreme Court decided *Kansas v. Hendricks*, ___ U.S. ___, 117 S.Ct. 2072 (1997), holding that Kansas's involuntary commitment statute for sexually violent predators did not violate the Substantive Due Process Clause, the Ex Post Facto Clause, or the Double Jeopardy Clause. The Kansas statute was

essentially indistinguishable from the Washington statute. The Ninth Circuit remanded Young's case to the district court for reconsideration in light of *Hendricks*.

Without conducting an evidentiary hearing, the district court denied Young's petition. Young appealed.

[1] If the Washington statute is punitive, it imposed a new punitive measure—indefinite confinement—on Young for crimes he committed before the statute's enactment, and punished Young after he served his criminal sentences for the same offenses. If Young's confinement pursuant to the Washington statute was punitive, the statute, as applied to Young, violated the Ex Post Facto and Double Jeopardy Clauses.

[2] Because the Kansas statute was modeled on and was substantially similar to the Washington statute, *Hendricks* foreclosed the claim that on its face the Washington statute violates the Ex Post Facto and Double Jeopardy Clauses. [3] But *Hendricks* did not preclude the possibility that the statute was punitive as applied.

[4] An evidentiary hearing on a habeas corpus petition is required whenever a petitioner's allegations, if proved, would entitle him to relief, and no state court trier of fact has, after a full and fair hearing, reliably found the relevant facts. [5] Young alleged facts which, if proved, would have established the punitive nature of his confinement and would have entitled him to relief. [6] The Washington courts did not afford Young a full and fair hearing concerning the conditions of his confinement. [7] Young was entitled to an evidentiary hearing in district court.

COUNSEL

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Sarah Sappington, Assistant Attorney General, Seattle, Washington, for the respondent-appellee.

ORDER

The opinion filed May 20, 1999, is amended as follows:

Slip opinion page 4757, after the paragraph ending with footnote 4, insert:

> Actual conditions of confinement may divest a facially valid statute of its "civil" label only upon a showing by the "clearest proof" that the statutory scheme is punitive in its "effect." *Id.* at 2082. As discussed below, we conclude that Young has alleged sufficient facts that, if proved, would constitute such "clearest proof."

With this amendment, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

PREGERSON, Circuit Judge:

This case involves the constitutionality of Washington State's Sexually Violent Predator Statute as applied to petitioner Andre Brigham Young. Young has been indefinitely confined pursuant to the statute since 1990. He appeals the district court's denial of his petition for writ of habeas corpus. We have jurisdiction under 28 U.S.C. § 2253,[2] and we reverse and remand in part and affirm in part.

---

[2]Because Young filed his habeas petition in 1994, the Antiterrorism and Effective Death Penalty Act of 1996 does not apply. *See Jeffries v. Wood*, 103 F.2d 827 (9th Cir. 1996).

PROCEDURAL HISTORY

This is the second time that this case is before us.

The district court originally granted Young's petition on cross-motions for summary judgment on the ground that the statute, R.C.W. § 71.09 ("Washington statute" or "statute"), violated the United States Constitution. *See Young v. Weston*, 898 F.Supp. 744 (W.D. Wash. 1995) ("*Young I*"). When it granted the petition, the court ruled that the statute, on its face, violated (1) the substantive due process protections of the due process clause because it permits indefinite incarceration without a showing of mental illness, (2) the *ex post facto* clause because it is punitive and applies retrospectively, and (3) the double jeopardy clause because it imposes additional incarceration on a person who has already been punished for the commission of a criminal offense. *See id.* Because the court found the statute to be facially unconstitutional, it denied as unnecessary Young's request for a hearing.

Respondent appealed to this court. While the appeal was pending, the Supreme Court issued *Kansas v. Hendricks*, 117 S.Ct. 2072 (1997). In *Hendricks*, the Supreme Court held, *inter alia*, that Kansas's involuntary commitment statute for sexually violent predators ("Kansas statute") did *not* violate the substantive due process, *ex post facto*, or double jeopardy clauses of the United States Constitution. Our court then remanded this matter to the district court for reconsideration in light of *Hendricks*. *See Young v. Weston*, 122 F.3d 38 (9th Cir. 1997) ("*Young II*").

On remand, the district court received supplemental briefing on the impact of *Hendricks*. After oral argument, but without conducting an evidentiary hearing, the district court denied Young's petition. *See Young v. Weston*, No. CV-94-00480C (W.D. Wash. filed Feb 10, 1998) ("*Young III*"). Young timely appealed.

DISCUSSION

Young's challenge to his indefinite confinement raises numerous issues, which can be grouped into four general categories: (1) whether the Washington statute violates the *ex post facto* and double jeopardy clauses of the United States Constitution, because the statute's *effect* is punitive; (2) whether the interpretation and implementation of the statute violates the substantive due process protections of the due process clause of the United States Constitution; (3) whether the statute, on its face and as interpreted by the Washington Supreme Court, violates the equal protection clause of the United States Constitution; and (4) whether Young's confinement is unlawful because (a) he was denied a constitutionally required probable cause hearing, and (b) the commitment trial court committed several trial errors.

I.

[1] The linchpin of this case is whether the Washington statute, as applied to Young, is punitive and thereby subject to the *ex post facto* and double jeopardy clauses of the United States Constitution. The *ex post facto* clause "forbids the application of any new punitive measure to a crime already consummated." *Hendricks*, 117 S.Ct. at 2086 (internal quotation marks and citations omitted); U.S. Const., art. 1, § 10. The double jeopardy clause prevents the state from "punishing twice, or attempting a second time to punish criminally, for the same offense." *Id.* at 2085 (internal quotation marks and citations omitted); U.S. Const., amend. 5. If the Washington statute is punitive, then it (1) imposes a new punitive measure—indefinite commitment—on Young for crimes he committed before the statute's enactment, and (2) punishes Young again, after he has already served his criminal sentences, for the same criminal offenses. Therefore, if Young's confinement pursuant to the Washington statute is punitive, then the statute, as applied to Young, violates the *ex post facto* and double jeopardy clauses of the United States Constitution.

A.

[2] In *Hendricks*, the Supreme Court held that, because involuntary confinement pursuant to Kansas's civil commitment statute is *not* punitive, that statute's operation does not raise *ex post facto* or double jeopardy concerns. *See Hendricks*, 117 S.Ct. at 2085-96. Because the Kansas statute was modeled on and is substantially similar to the Washington statute,[3] *Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses.

[3] But *Hendricks* does not preclude the possibility that the Washington statute, *as applied*, is punitive. *See id.* at 2082. In fact, both the majority and concurring opinions in *Hendricks* turn repeatedly to the question whether the conditions of Hendricks's confinement rendered the Kansas statute punitive. *See id.* at 2082, 2085 (majority opinion); *see also id.* at 2087 (Kennedy, J., concurring). Heeding Justice Kennedy's reminder that our concern is *not* "how long [Young] and others like him should serve a criminal sentence," but rather "whether it is the criminal system or civil system which should make the decision," *id.* at 2087 (Kennedy, J., concurring), we must determine whether Young's confinement is criminal rather than civil. And, following the dictates of *Hendricks*, we look to the *conditions* of Young's confinement when we make that determination.[4]

---

[3] For a brief description of the Washington statute, see *Young I*, 898 F.Supp. at 746-48.

[4] Relying on *Hudson v. United States*, 118 S.Ct. 488 (1997), Washington argues that the conditions of confinement are irrelevant to the court's inquiry. We disagree. Whereas *Hudson* involved monetary penalties and occupational disbarment, *see id.* at 493, this case involves confinement. In cases considering the question whether confinement is criminal or civil, the Supreme Court has always looked to the actual conditions of confinement. *See, e.g., Hendricks*, 117 S.Ct. at 2082-85; *Allen v. Illinois*, 478 U.S. 364, 373-74 (1986); *see also Bell v. Wolfish*, 442 U.S. 520, 535-39 (1970).

Actual conditions of confinement may divest a facially valid statute of its "civil" label only upon a showing by the "clearest proof" that the statutory scheme is punitive in its "effect." *Id.* at 2082. As discussed below, we conclude that Young has alleged sufficient facts that, if proved, would constitute such "clearest proof."

B.

Young has exhausted his claim that his conditions of confinement at the Special Commitment Center render the Washington statute, as applied to him, punitive. Not only did Young raise the "substance" of his claim to the Washington state courts, *see Picard v. Connor*, 404 U.S. 270, 277-78 (1971); *Chacon v. Wood*, 36 F.3d 1459, 1467 (9th Cir. 1994), but he repeatedly attempted to present to the state courts evidence of the conditions of his confinement and the quality of treatment at the Special Commitment Center. The fact that the state courts refused to receive this evidence does not render Young's claim unexhausted.

C.

[4] "An evidentiary hearing on a habeas corpus petition is required whenever a petitioner's allegations, if proved, would entitle him to relief, and no state court trier of fact has, after a full and fair hearing, reliably found the relevant facts." *Turner v. Marshall*, 63 F.3d 907, 815 (9th Cir. 1995) (internal quotation marks and citations omitted). In reviewing the district court's failure to hold an evidentiary hearing, this court considers the following questions: (1) did Young allege facts which, if proved, would entitle him to relief, and (2) if so, did a state court reliably find the relevant facts.

[5] We hold that Young alleged facts which, if proved, would establish the punitive nature of his confinement and would entitle him to relief. Young's initial allegations before the district court included the following:

- Young is subject to conditions more restrictive than those placed either on true civil commitment detainees or even those placed on state prisoners;[5]
- Young has been subject to such conditions for more than seven years;[6]
- The Special Commitment Center is located wholly within the perimeter of a larger Department of Corrections facility and relies on the Department of Corrections for a host of essential services, including library services, medical care, food, and security;[7]
- The conditions of confinement at the Special Commitment Center are not compatible with the Washington statute's treatment purposes;[8]
- The conditions and restrictions at the Special Commitment Center are not reasonably related to a legitimate non-punitive goal;[9] and
- The conditions of confinement at the Special Commitment Center do not comport with substantive due process.[10]

---

[5] *Compare Hendricks*, 117 S.Ct. at 2082; *Allen*, 478 U.S. at 373-74.

[6] *Compare Hendricks*, 117 S.Ct. at 2085.

[7] *Compare id.*

[8] *Compare Allen*, 478 U.S. at 373.

[9] *Compare Bell*, 441 U.S. at 539.

[10] *Compare Bell*, 441 U.S. at 535, 536.

In Young's motion to alter the district court's judgment denying his writ of habeas corpus, Young presented further allegations:

> - Court-appointed Resident Advocate, psychologist Stanley Greenberg, concluded in his final report, "[b]ecause the SCC [Special Commitment Center] hasn't fundamentally changed over so many years, even with a court injunction, I have come to suspect that it is designed and managed, either overtly or covertly, to punish and confine these men and women to a life sentence without any hope of release to a less restrictive setting";
>
> - The Department of Corrections staff's role in running the Special Commitment Center had increased: daily Department of Corrections security "walk-throughs"; continued Department of Corrections responsibility for Special Commitment Center residents' medical care (including requirements that residents be shackled and dressed in prison jumpsuit when taken to the Washington State Reformatory infirmary); and continued Department of Corrections responsibility for meals;[11]
>
> - Special Commitment Center residents were housed in units that were, according to Special Master Janice Marques, "clearly inappropriate for individuals in a mental health treatment program";[12] and

[11] *Compare Hendricks*, 117 S.Ct. at 2085.

[12] *Compare Allen*, 478 U.S. at 373.

> - There were still no certified sex-offender treatment providers at Special Commitment Center.[13]

By alleging that Washington's sexually violent predator statute is punitive as applied, Young alleged facts which, if proved, would entitle him to relief. Therefore, we must consider whether a state court reliably found the relevant facts.

[6] It is clear to us that the Washington state courts did not afford Young a full and fair hearing concerning the conditions of confinement in the Special Commitment Center. The trial court refused to allow Young to present factual evidence on the actual conditions of confinement and the quality of treatment at trial either in a challenge to the law or before the jury. Nor did Young's factual challenge regarding the conditions of confinement receive a full and fair hearing by the Washington Supreme Court. Indeed, despite its consideration of the question whether the actual impact of the statute was criminal, *see In re Young*, 122 Wash.2d 1, 19 (1993), the Washington Supreme Court declared in its discussion of Young's substantive due process claims that the issues of the actual conditions of confinement and the quality of treatment were "not before the court." *Id.* at 35.

[7] "The power of inquiry on federal habeas corpus is plenary." *Rhoden v. Rowland*, 10 F.3d 1457 (9th Cir. 1993) (internal quotation marks and citations omitted). Here, where the state trier of fact did not afford Young a full and fair hearing concerning the conditions of confinement in the Special Commitment Center, Young is entitled to an evidentiary hearing in federal district court. *See Chacon*, 36 F.3d at 1465-66; *see also Townsend v. Sain*, 362 U.S. 293, 313 (1963), *overruled in part by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5 (1992).

[13] *Compare Hendricks*, 117 S.Ct. at 2085.

II.

Young also argues that the Washington courts' interpretation of the term "mental abnormality" is so vague as to violate his right to substantive due process. As the district court correctly concluded, this argument is not supported by the law. *See Hendricks*, 117 S.Ct. at 2081 & n.3; *id.* at 2080; *Heller v. Doe*, 509 U.S. 312, 314-15 (1993); *Allen v. Illinois*, 478 U.S. 364, 366 (1986). Therefore, while the statute's failure to limit its reach to those who completely lack control may be an indicia of a forbidden deterrent purpose, this failure does not, by itself, render the statute unconstitutional.

III.

Young further contends that the Washington statute, on its face and as interpreted by the Washington Supreme Court in *In re Young*, 122 Wash.2d at 41, violates equal protection. Applying the heightened scrutiny standard, the district court concluded that the classifications that Young challenges are substantially related to the achievement of an important governmental interest. This conclusion was not in error.

IV.

Young's final claims pertain to alleged errors in his particular commitment procedure.

A.

Young argues that the trial court's failure to hold a constitutionally required probable cause hearing warrants reversal. Because Young offers no support for his argument that this omission had any bearing on the ultimate outcome of his trial, this omission does not entitle Young to relief.[14] *Cf.*

[14]To the extent that Young's claim of prejudice relies on his argument that he was deprived of the opportunity to present less-restrictive alternatives to confinement based on his situation at the time of his initial confinement, this issue is not before the court. The Washington state courts have yet to render a final judgment on the issue of less-restrictive alternatives to Young's confinement.

Powell v. Nevada, 511 U.S. 79, 84 (1994); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975).

To be sure, Washington's refusal to allow Young to appear before any court for four months—where those facing commitment under Washington's regular civil commitment statute are entitled to a *prompt* probable cause hearing—may be an indicia of the statute's punitive purpose or effect. Nevertheless, the omission of such a hearing in this case does not, by itself, require reversal.

B.

Finally, Young argues that the district court erred in finding that several alleged trial errors did not require reversal. We disagree and affirm the district court's rulings with regard to these alleged errors.

CONCLUSION

Because the district court did not conduct an evidentiary hearing on the question whether the conditions of Young's confinement at the Special Commitment Center rendered the statute punitive as applied to Young, we reverse and remand for further proceedings on the *ex post facto* and double jeopardy clause claims. We affirm the district court on all other grounds.

REVERSED and REMANDED in part. AFFIRMED in part.

[FILED]
[October 19, 1999]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Andre Brigham Young	)	No. 98-35377
	)	
Petitioner-Appellant,	)	ORDER
	)	
v.	)	
	)	
DAVID WESTON,	)	
	)	
Respondent-Appellee.	)	

Before: PREGERSON and THOMPSON, Circuit Judges, and KELLEHER, District Judge.[1]

The motion to stay the issuance of the mandate is granted.

[1] Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

[FILED]
[February 10, 1998]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDRE BRIGHAM YOUNG	)	
	)	
Petitioner,	)	No. C94-480C
	)	
v.	)	ORDER
	)	
DAVID WESTON, Superintendent of the Special Commitment Center,	)	
	)	
Respondent.	)	

INTRODUCTION

On August 25, 1995, this Court granted petitioner's writ of habeas corpus, finding Washington's sexually violent predator statute, RCW § 71.09, ("SVP") unconstitutional on its face. Adhering to the principle that the dictates of the Constitution apply even to those who have committed terrible crimes and who are reviled by the community, the Court found that the SVP violated three core tenets of the Constitution: the statute violated substantive due process because it permits indefinite incarceration without a showing of mental illness, the ex post facto clause because it was punitive and applied retrospectively, and double jeopardy as it imposes additional incarceration on a person who has been punished already for the commission of a sexually violent offense.

Respondent appealed to the Ninth Circuit Court of Appeals, which remanded for reconsideration in light of the U.S. Supreme Court's decision in *Kansas v. Hendricks*, 521 U.S. ___, 117 S. Ct. 2072 (1997). *Hendricks* rejected a constitutional challenge to the Kansas involuntary commitment statute for sexually violent predators, and addressed the same three legal challenges on which this Court based its previous Order. This Court ordered supplemental briefing and on January 30, 1998, heard oral argument. The Supreme Court having set the law of the land in *Hendricks*, this Court is now compelled to deny relief to Mr. Young and find that the SVP does not violate substantive due process, the ex post facto clause, or double jeopardy. Nor can the Court find for petitioner on claims which are outstanding from the 1995 summary judgment motions.

ANALYSIS

I. Punitive Nature of Statute

The Supreme Court found that Kansas's statute is not punitive and is thus constitutional under the jurisprudence governing civil commitments. The Kansas statute was modeled after the Washington statute and the two are identical in all relevant respects. Young argues that if this Court goes beyond the face of the statute, Young has provided "the clearest proof" that, unlike Kansas's statute, Washington's "statutory scheme is so punitive either in intent or effect" that this Court should once again strike down Washington's statute.

In finding the Kansas statute non-punitive, however, the Supreme Court considered and found unpersuasive much of the same kind of evidence presented by Young. First, Young argues that Washington's treatment program does not provide sufficient treatment for those incarcerated under

71.09.[1] Kansas had initial difficulties in establishing a treatment program also, *Hendricks*, 117 S. Ct. at 2085, but because states enjoy "wide latitude in developing treatment regimes," *id.* at n.4, the Supreme Court looked past those difficulties and focused primarily on the face of the statute instead. The Court focused on the language of the statute and found that "the State has a statutory obligation to provide care and treatment for [persons adjudged sexually dangerous] designed to effect recovery and [the Court] may therefore conclude that 'the State has . . . provided for the treatment of those it commits." *Hendricks*, 117 S. Ct. at 2084. The statutory language the Supreme Court found relevant is identical in the Kansas and Washington statutes.[2]

Second, Young presents evidence that some of the statute's official supporters saw it as an opportunity to permanently confine dangerous sex offenders.[3] The same was true in Kansas.[4] Where the state expressly disavows any punitive intent, and the structure of the statute supports treatment and release, however, the Supreme Court has found that such statements do not prove a contrary intent.

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[1] The evidence on which that argument is based, *Turray v. Seling*, No. C91-664WD (W.D. Wash.), was not before the Washington State Supreme Court.

[2] Compare RCW § 71.09.060(1) with Kan. Stat. Ann. § 59-29a07(a).

[3] In Washington, the SVP's chief drafter saw the SVP as filling a gap between criminal sentences and civil commitment for those sex offenders who admittedly are not "mentally ill" and as part and parcel of efforts for "strengthening and toughening, lengthening sentences" for criminal sex offenders.

[4] In Kansas, "some of the Act's official supporters [saw] in it an opportunity permanently to confine dangerous sex offenders . . . . Others thought that effective treatment did not exist . . . ("Because there is no effective treatment for sex offenders, this Bill may mean a life sentence for a felon that is considered a risk to women and children. SO BE IT!)" *Hendricks*, 117 S. Ct. at 2093.

Given the Supreme Court's finding that the Kansas statute is not punitive, this Court must find that the Washington statute is similarly non-punitive.[5] Since the statute is not a criminal commitment scheme, the concepts of the ex post facto clause and double jeopardy do not prohibit involuntary commitment for sexually violent predators.

II. Substantive Due Process

Young also argues that his situation makes real Justice Kennedy's warning that when the term "mental abnormality" is shown to be "too imprecise," the law should be voided. 117 S. Ct. at 2087. Young contends that in light of Justice Kennedy's concurrence, the majority opinion should be narrowly construed, essentially to require: (1) diagnosis of a recognized paraphilia; and, (2) "lack of volitional control, coupled with a prediction of future dangerousness." Additionally, Young argues that the burden of proof used in the SVP violates substantive due process.

1. Recognized Paraphilia

The majority found that Hendricks met Kansas's statutory criteria and his commitment under the statute was not unconstitutional because, in part, "[t]he mental health professionals who evaluated Hendricks diagnosed him as suffering from pedophilia, a condition the psychiatric profession itself classifies as a serious mental disorder . . . ." 117 S. Ct. at 2081 (internal citations omitted). Justice Kennedy also found important the fact that Hendricks' "mental abnormality" -- pedophilia -- is at least described in the DSM-IV." 117 S. Ct. at 2087. Justice Breyer's dissent also emphasized that the psychiatric profession "classifies the kind of problem from which Hendricks suffers as a serious mental disorder." Id. at 2088.

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[5] The dissent even notes that the Kansas statute is more punitive than any other similar statute, including Washington's, as it does not provide for a less restrictive alternative. *See Hendricks*, 117 S. Ct. at 2094.

Young, on the other hand, was found to have a "mental abnormality" which is a "paraphilia not otherwise specified," i.e. rape. Rape is not recognized as a paraphilia in the DSM-IV. Nonetheless, the Supreme Court made clear that a mental abnormality did not have to be a recognized mental illness for the statute to be constitutional. 117 S. Ct. at 2081 & n.3 ("when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation'").

2. "lack of volitional control, coupled with a prediction of future dangerousness"

The Court stressed that "Hendricks even conceded that, when he becomes 'stressed out,' he cannot 'control the urge' to molest children. This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." 117 S. Ct. at 2081. While the majority refers to a "volitional impairment rendering [sex predators] dangerous beyond their control" and "the class of persons eligible for confinement to those who are unable to control their dangerousness," *id.* at 2080, this Court reads *Hendricks* to require only that it be "difficult, if not impossible, for the person to control his dangerous behavior." *Id.* Indeed, Hendricks conceded his inability to control his criminal urges only when he is "stressed out." The Washington statute similarly does not require a complete inability to control the criminal urges associated with the diagnosed "mental abnormality." Young is correct that as applied to him the SVP may have some measure of deterrent effect since it does not require a person be utterly incapable of control under any circumstance. Yet, when faced with that same scenario in Hendricks's case, the Supreme Court overlooked that deterrent effect and did not find it sufficient to render the statute punitive.

Hendricks also reconfirmed that predicting dangerousness was legally possible. 117 S. Ct. at 2080. Such a prediction was made in Young's case. Thus, both conditions which existed in *Hendricks* exist in Young's case as well.

3. Burden of Proof

In *Addington v. Texas*, 441 U.S. 418 (1979), the Court held that substantive due process requires "clear and convincing proof" of both "mental illness" and "dangerousness." Young argues that the SVP does not meet that threshold because it requires only "proof beyond reasonable doubt" that a person will "more likely than not," 71.09.020(3), "engage in predatory acts of sexual violence." 71.09.020(1). In essence, argues Young, the statute uses the preponderance standard rejected in *Addington*.

The Kansas statute, § 59-29a02(a), uses precisely the same language, however, and *Hendricks* determined that the statute does not violate substantive due process. This Court need go no further.[6]

II. *Frye* Hearing

Young argues that procedural due process and evidentiary rules require that scientific evidence used as the basis for commitment meet the requirements of science as set forth in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). Young contends that the technique employed by the expert, i.e. clinical prediction, is not reliable and thus has not

[6] Young also argues the term "likely" violates equal protection. That argument is predicated on a finding that 71.05 has a more lenient standard than 71.09 in proving dangerousness. As determined by Hendricks, that is not the case. Young also argues that clear and convincing evidence of a substantial risk of dangerousness is a higher standard of proof because it requires a recent overt act, *In re Harris*, 98 Wash. 2d at 284, whereas 71.09 does not. Whether or not an overt act should be required is a different equal protection question, however, which is discussed below. As discussed infra, III.A., the government's argument that the equal protection challenge is unexhausted is rejected.

"achieved general acceptance" in the relevant scientific community. *Frye*, 293 F. 1014. Be that as it may, the Supreme Court has accepted clinical predictions of dangerousness to be reliable enough for a variety of purposes, including for evidentiary purposes in civil commitment proceedings. *See Foucha v. Louisiana*, 504 U.S. 71, 75 n.3 (1992).

In Washington, clinical predictions of future dangerousness are also considered sufficiently accurate and reliable for evidentiary purposes. *In Re Young*, 122 Wash. 2d 1, 56-57 (1993); *State v. Pryor*, 115 Wash. 2d 445, 454 (1990); *In Re Harris*, 98 Wash. 2d 276, 280 (1982). The *In Re Young* court adopted the *Harris* court finding that Young's argument "would eviscerate the entire law of involuntary commitment as well as render dubious the numerous other areas where psychiatry and the law intersect . . . ." 122 Wash. 2d at 56. Young's *Frye* argument thus fails to support affirmance of the writ.

III. Equal Protection

Young's equal protection challenge compares 71.09 as a whole to 71.05 as a whole. However, in the Washington Supreme Court only certain sections of the statutes were compared and briefed. In his summary judgment motion and the supplemental briefing before this Court, Young compares some of the same sections and adds additional comparisons that allegedly violate equal protection.

A. Exhaustion

Exhaustion of state remedies requires petitioner to have "fairly presented" federal claims to the state courts in order to give the State the "opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Picard v. Connor*, 404 U.S. 270, 275 (1971) (internal citations and quotation marks omitted). "A federal claim is fairly presented if the petitioner has described the operative facts and legal theory upon which his claim is based." *Rice*

v. Wood, 44 F.3d 1396 (9th Cir. 1995), *opinion vacated in other part*, 77 F.3d 1138 (9th Cir. 1996).

Young's habeas petition states a general equal protection challenge, and then specifically refers to the "recent overt act" requirement and the right to remain silent. The government argues that, other than the right to remain silent, all the equal protection challenges are unexhausted as they were not presented to the Washington State Supreme Court. In fact, however, the Washington State Supreme Court was specifically presented with equal protection challenges to the following sections: 71.05.240 (requirement of probable cause hearing within 72 hours, need to consider less restrictive alternatives), 71.05.280 (grounds for 90 day confinement), 71.05.310 (jury trial on petition for 90 day treatment, follow rules of evidence pursuant to 71.05.250 and due process), 71.05.320 (provisions for additional confinement, consideration of less restrictive alternative). And, the Washington State Supreme Court undertook an equal protection analysis of the "overt act" requirement. *Young*, 122 Wash. 2d at 44.

Accordingly, petitioner has exhausted his equal protection claims which are related to the sections of the SVP presented to the Washington State Supreme Court, as well as the "overt act" distinction created by the Court's equal protection analysis. This Court addresses the following claims below: (1) 71.09 does not provide the right to remain silent that 71.05 does; (2) 71.09 provides for less frequent judicial review of the commitment; (3) 71.09 does not require a "recent overt act" to prove dangerousness for those currently incarcerated as opposed to those who have been released; and, (4) 71.09 probable cause hearings do not provide the same protections as 71.05 hearings. Other arguments raised in the briefing were not raised to, or addressed by, the Washington State Supreme Court, nor were they raised in the habeas petition, so they are not considered by this Court.

B. Standard of Review

The parties differ as to what level of review is appropriate. The U.S. Supreme Court has never applied heightened scrutiny to involuntary commitment cases, but has applied the "rational relation" test. *See, e.g., Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Baxstrom v. Herold*, 383 U.S. 107. However, as the Ninth Circuit pointed out in *Hickey v. Morris*, 722 F.2d 543 (1983), those cases were decided before the development of the "heightened scrutiny" test, which had its genesis in Justice Powell's concurring opinion in *Craig v. Borden*, 429 U.S. 190 (1976). In *Hickey*, the Ninth Circuit applied heightened scrutiny and rejected an equal protection challenge to the statute governing commitments of insanity acquitees. The Court specifically reserved the question of whether or not heightened scrutiny was the appropriate standard, however.

Subsequent to *Hickey*, the Supreme Court applied rational basis review in *Heller v. Doe*, 509 U.S. 312 (1993). It did so not because it found heightened scrutiny inapplicable to involuntary commitments, but because the parties had been litigating for years on the theory of rational basis review, because respondent had sought to use heightened scrutiny for the first time in the Supreme Court, and because "it would be imprudent and unfair to inject a new standard at this stage of this litigation. 509 U.S. at 319.

Although the question of the appropriate standard of review remains open, this Court will follow the Ninth Circuit's lead and apply "heightened scrutiny."

C. The Right to Remain Silent

The Washington Supreme Court found that the failure of 71.09 to provide the right to remain silent during the commitment trial did not violate equal protection because persons committed under 71.09 "are not similarly situated to the mentally ill in regard to the treatment methods employed,

or the information necessary to ensure that they receive proper diagnosis and treatment." 122 Wash. 2d at 51. The Court relied on the legislature's findings and found that:

> The problems associated with the treatment of sex offenders are well documented, and have continued to confound mental health professionals and legislators. The mental abnormalities or personality disorders involved with predatory behavior may not be immediately apparent. Thus, their cooperation with the diagnosis and treatment procedures is essential.

Young, 122 Wash. 2d at 52.

The government argues that because of the "profound public safety implications of sexual predator proceedings," it is more important to have a personal interview in 71.09 than in 71.05 for proper treatment and diagnosis. However, as the Washington court correctly found, quoting *Baxstrom*, 383 U.S. at 111, "the dangerousness of the detainee may be a reasonable distinction for purposes of determining the type of *custodial or medical care* to be given, but it has *no relevance whatever* in the context of the opportunity to show whether a person is mentally ill *at all*." 122 Wash. 2d at 45 (emphasis in original).

As petitioner accurately points out, the differences in *treatment* are not relevant when determining whether or not a person is a sex predator. The objective of treatment is not served by forcing a person to cooperate with a mental health expert prior to commitment. However, an accurate *diagnosis* is relevant to the commitment proceedings, as commitment is based in large part on an expert's diagnosis of the person as a sex predator. Thus, cooperation with a state expert may be important for diagnostic purposes. The government explains that diagnosing a "sex predator" is unlike diagnosing a mentally ill person because of the difficulty in making the diagnosis since it is "not immediately apparent" if a person

has "the mental abnormalities or personality disorders involved with predatory behavior" and as there is no requirement of a recent overt act. Although in Young's case the state's expert said that an in-person assessment would not change his "diagnostic impression" because the most important factor for him was past history, the Court cannot conclude that the government is incorrect in asserting that an in-person interview still is important for the expert to come to a conclusion based on more than just a diagnostic impression. The government has shown a substantial relation between forced cooperation and a legitimate government interest (correct diagnosis).

D. Frequency of Judicial Review of Commitment

Young argues that 71.05 requires review at 72 hours, then at 14, 90, and 180 days, but that 71.09 has only a 72 hour, a 45 day, and an annual review. The government responds that the differences are substantially related to the differences in the two populations.

The government argues that the 45 day pre-trial detention (versus 14 days) is needed for a thorough evaluation, which includes personal interviews, of the detainee before trial. Additionally, the time is necessary for trial preparation by counsel as the trials are lengthy and complex. The Court finds these differences to be substantial reasons for the additional days of pretrial detention. Moreover, Young waived his right to a jury in 45 days and delayed the trial for four months, so he is not in the position to argue that the delay in 71.09 harmed him.

As for review after commitment, the two groups are not similarly situated for treatment purposes and the difference in frequency of review is substantially justified by the significant difference in treatment possibilities. Sexual predators are "generally . . . unamenable to existing mental illness treatment modalities . . . ." RCW 71.09010. On the other hand, those committed under 71.05 may be treated

under "existing mental illness treatment modalities" as they are in fact mentally ill.

E. Recent Overt Act

The Washington Supreme Court sua sponte engrafted a requirement that in order to commit "sex predators" who had been released into the community prior to commencement of SVP proceedings, the government had to prove dangerousness with a recent overt act. But, for those still serving their criminal sentences at commencement of SVP proceedings the government does not need to prove dangerousness with a recent overt act. Although the Washington court couched its analysis in substantive due process terms, in essence it found that the two groups were not similarly situated because a detainee does not have access to possible victims compared with a person who has been released who does have the opportunity to commit an overt act. The same analysis applies in the equal protection context. Since the the two groups are dissimilar, they need not be treated the same under the Constitution.

F. Probable Cause Hearing

The Washington Supreme Court found that equal protection required a probable cause hearing within 72 hours for detainees under 71.09. But, it found that the lack of such a hearing was harmless error in Young's case. 122 Wash. 2d at 43-47. Young argues that under *In re Swanson*, 110 Wash. 2d 21, 31 (1990), the Court should have automatically reversed once it found error and harmless error analysis is inapplicable.• Young's cite is to dicta in *Swanson* which said that if the state "had totally disregarded the requirements of the statute, or had failed to establish legal grounds for Swanson's commitment," dismissal would have been proper. *Id.* Here, there was no statutory mandate that the state "totally disregarded" and the state did establish the legal grounds for Young's commitment. Thus, it is not the kind of case envisioned in *Swanson* where reversal is the appropriate remedy.

IV. Cumulative Trial Errors

Young also argues that cumulative trial errors made the outcome of his trial fundamentally unfair. *Estelle v. McGuire*, 502 U.S. 62 (1991). In state court, Young did not argue cumulative errors, only that each of the errors violated due process. The claim is therefore unexhausted. Even if he had exhausted the claim, however, he has not shown that the trial was so unfair as to violate the narrowly defined class of rights such as those specifically enumerated in the Bill of Rights. *Estelle*, 502 U.S. at 78. While adherence to state evidentiary rules suggest the trial was fair, "it is certainly possible to have a fair trial even when the state standards are violated . . . ." *Jammal v. Van DeKamp*, 926 F.2d 918, 919 (9th Cir. 1991). For the same reasons the Washington Supreme Court found that the trial court either did not commit errors or that the errors were harmless, the Court finds that Young has not stated a cognizable claim in habeas.

CONCLUSION

Petitioner's writ of habeas corpus is hereby DENIED.

DATED this 10th day of February, 1998.

s/JOHN C. COUGHENOUR
United States District Judge

[Filed August 9, 1993]

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of ANDRE BRIGHAM YOUNG, Petitioner.	)	No. 57837-1 En Banc
In the Detention of ANDRE BRIGHAM YOUNG, Appellant.	)	
In re the Personal Restraint Petition of VANCE RUSSELL CUNNINGHAM, Petitioner.	)	No. 57838-9
In re the Detention of VANCE RUSSELL CUNNINGHAM, Appellant.	)	

[As amended by order of the Supreme Court August 12, 1993. Citations have been updated from original.]

DURHAM, J. -- In this case, the sexually violent predator provisions of the Community Protection Act of 1990 are challenged by two people who have been civilly committed under its authority. Important constitutional and

technical issues are raised by this unique legislation, which seeks to protect our citizens by incapacitating and attempting to treat those whose mental abnormalities create a grave risk of future harm. Although the ultimate goal of the statute is to treat, and someday cure those whose mental condition cause them to commit acts of sexual violence, its immediate purpose is to ensure the commitment of these persons in order to protect the community. In this sense, it is similar to any other civil commitment. However, the Legislature has found that the exceptional risks posed by sexual predators, and the seemingly intractable nature of their illness, necessitates a specially tailored civil commitment approach. After exhaustive review of the numerous challenges raised by petitioners, we conclude that the sex predator provisions of the Community Protection Act of 1990 are constitutional. However, for reasons stated below, we reverse petitioner Cunningham's commitment, and remand petitioner Young's case for consideration of less restrictive alternatives.

The numerous issues raised by Young and Cunningham can be categorized as follows: First, petitioners claim that the act violates the ex post facto clause and the prohibition against double jeopardy. Resolution of those issues depends on whether the law is civil or criminal in nature. Second, petitioners raise several substantive due process arguments. They claim that the State lacks sufficient justification to deprive them of their liberty, and that the sex predator statute amounts to unconstitutional preventive detention. They also contend, as a substantive matter, that dangerousness must be proved by evidence of a recent overt act, and that they are entitled to less restrictive conditions of confinement. Third, petitioners argue that there are several procedural deficiencies. They claim that the probable cause hearing should not be held ex parte, that the jury verdict should be unanimous, that the selection of the juries was flawed, that the act is void for vagueness, and that they were unconstitutionally denied a right to remain silent. Finally, several evidentiary issues are raised.

I

BACKGROUND

1. The Act.

The Community Protection Act of 1990 (the Act) was passed in response to citizens' concerns about the State's laws and procedures regarding sexually violent offenders. *See* Governor's Task Force on Comm'ty Protec., *Final Report* I-1 (1989) (hereinafter *Report*). The impetus for convening the task force was the commission of two violent crimes: the murder of a Seattle woman by an offender on work release, and the violent sexual attack on a young Tacoma boy. *Report*, at I-1. The Act contains 14 separate sections, dealing with such topics as registration of sex offenders, crime victims' compensation, background checks, and increased penalties for sex offenders. Laws of 1990, ch. 3, p. 12.

Part X of the Act is entitled "Civil Commitment" and is codified at RCW 71.09 (hereinafter Statute). Under the Statute, those defendants who are determined to be "sexually violent predators" can be involuntarily committed after they have served their sentences. The Legislature enacted extensive findings. Among those, the Legislature stated:

> In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. . . . The legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are

> very different than the traditional treatment modalities . . ..

RCW 71.09.010.

A "sexually violent predator" is someone "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." RCW 71.09.020(1). Crimes of sexual violence are enumerated in the Statute, and include crimes not usually considered sex offenses if they are determined beyond a reasonable doubt to have been "sexually motivated". RCW 71.09.020(4)(c). The term "personality disorder" is not defined by the Statute, but the term "mental abnormality" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts". RCW 71.09.020(2). "Predatory" acts are those directed at strangers, or individuals groomed by the offender for the purpose of victimization. RCW 71.09.020(3).

Under the Statute, when a person's sentence for a sexually violent offense has expired or is about to expire, the State is authorized to file a petition alleging the person to be a sexually violent predator. RCW 71.09.030; *see also* RCW 71.09.025. When the petition is filed, a judge must determine ex parte if "probable cause exists to believe that the person named in the petition is a sexually violent predator". RCW 71.09.040. When probable cause is found, the person is taken into custody and transferred to a facility for evaluation, pursuant to rules developed by the Department of Social and Health Services (DSHS). Within 45 days, the court shall conduct a trial to determine if the person is a sexually violent predator. RCW 71.09.050. Either party, or the court, may demand a jury trial.

The detainee has a statutory right to counsel. In addition, the detainee may be examined by a qualified expert

of his or her choice. Both services will be provided if the person is indigent. RCW 71.09.050. The burden is on the State to prove, beyond a reasonable doubt, that the detainee is a sexually violent predator. RCW 71.09.060(1). If so, then he or she shall be committed to a facility "for control, care, and treatment" until "safe to be at large". RCW 71.09.060(1). The Statute limits treatment centers to mental health facilities located within correctional institutions. RCW 71.09.060(3); RCW 10.77.220.

The detainee must be examined annually to determine his or her mental condition, and the results must be provided to the trial court. RCW 71.09.070. In addition, the person may obtain an additional examination at state expense, if necessary. RCW 71.09.070. If it appears that the person is no longer a sexually violent predator then the secretary of DSHS shall authorize the detainee to petition the court for release. RCW 71.09.090. When such a petition is filed, the court must order a hearing within 45 days. At the hearing, a jury may be demanded by either party, and the burden is on the State to prove, beyond a reasonable doubt, that the detainee is not safe to be at large. RCW 71.09.090(1).

A detainee may also petition the court directly without the approval of the secretary. RCW 71.09.090(2). Upon filing such a petition, a show cause hearing is held, at which time the petitioner has the right to be represented by appointed counsel, but not the right to be present. If the court finds probable cause that the detainee is no longer dangerous, then a full hearing is held with the same procedures as above. The court will not hold any further hearings unless the detainee can show a change of circumstances. RCW 71.09.100.

2. Andre Brigham Young.

The petition in Andre Brigham Young's case was filed on October 24, 1990, 1 day prior to his release from prison for his most recent rape conviction. The certification for determination of probable cause (certificate) references

two psychological evaluations of Young and describes his criminal history, which includes six violent felony rapes of adult female strangers. These rapes, which the record suggests may be only a partial accounting of Young's sexual assaults, occurred over the past 31 years during the intermittent periods when Young was not in custody.

Young's first series of known rapes occurred in the fall of 1962, when he broke into the respective homes of four different women, forcing them to engage in sexual intercourse. On at least two of these occasions, Young threatened his victims with a knife. In another incident, he raped a young mother with a 5-week old infant nearby. Young was convicted in October 1963 on four counts of first degree rape, with two deadly weapon findings.

Less than a year later, while free on an appeal bond for his 1963 convictions, Young entered the home of another woman. With her child present, he exposed himself, threatened to hurt the child, and threatened to rape and kill the woman. Fortunately, he was frightened away. Young was charged with attempted rape, but was never tried for this offense because he was found incompetent.

Young was released on parole in January of 1972. After roughly 5 years of freedom, Young was again convicted of rape. As with the previously known offenses, he raped this woman after illegally entering her home in the early morning hours. Young pleaded guilty to third degree rape.

He was released from prison in 1980. In 1985, he raped another woman, again forcing his way into her apartment. Three small children were present. Young was convicted of first degree rape.

After reviewing the petition and supporting certificate, Judge Johnson issued an ex parte order which found probable cause, and directed the clerk to issue a no-bail arrest warrant and to transfer Young to the Special

Commitment Center at Monroe. Following Young's detention at Monroe, counsel for Young brought motions seeking transportation back to King County, a probable cause hearing to challenge the ex parte ruling, and bail -- all of which were denied by Judge Johnson. On November 14, 1990, over Young's assertion of a right to remain silent, Judge Johnson ordered him to participate in psychiatric evaluations. Young refused to participate in the evaluations. A pretrial hearing was held in mid-January where the Superior Court rejected constitutional challenges to the Statute. Young was not allowed to attend this hearing.

Trial began on February 12, 1991, in front of Judge Bever. Both sides presented testimony by expert witnesses. Young called Dr. Nancy M. Steele, a psychologist who works with sex offenders in Minnesota. She testified that there is no particular mental disorder that makes a person likely to re- offend. In addition, Dr. G. Christian Harris testified that rape is a behavior, not a diagnostic category, and that he could not accurately predict that any particular person would re-offend. Young also called Dr. Fred Wise, who questioned the legitimacy of the diagnostic impressions made by the State's expert witness.

The State called Dr. Irwin Dreiblatt, a licensed clinical psychologist who has evaluated some 1,400 sexual offenders and treated approximately 700 in his 25 years of practice. Based upon a records review, Dr. Dreiblatt testified to a reasonable psychological certainty that it was his diagnostic impression that Young suffered from: (1) a severe personality disorder not otherwise specified, with primarily paranoid and anti-social features, (2) a severe paraphilia, which would be classified as either paraphilia sexual sadism or paraphilia not otherwise specified (rape). Dr. Dreiblatt stated that the severe paraphilia constituted a "mental abnormality" under the sex predator commitment Statute. Dr. Dreiblatt further concluded that the severe paraphilia -- in combination with the personality disorder, the length of time

spanning Young's crimes, his recidivism record, his use of weapons, his persistent denial of the crimes and his lack of empathy or remorse for his victims -- made it more likely than not that Young "would commit further sexually violent acts." Report of Proceedings Young (RPY) (Feb. 27, 1991), at 166.

The victims of Young's previous rape convictions testified regarding the circumstances of their assaults. Evidence was introduced pertaining to a 1972 conviction for a bomb threat. Defense motions for jury instructions regarding the presumption of innocence, the appropriate inference from Young's failure to testify, and others were denied by the court. At the request of the State, the jury was instructed that a unanimous verdict was required. On March 8, the jury concluded that Young was a "sexually violent predator".

3. Vance Russell Cunningham.

The petition in Vance Russell Cunningham's case was filed on December 21, 1990, about 4 ½ months after Cunningham had completed his most recent prison sentence for rape. As with Young, the certificate for determination of probable cause references two psychological evaluations of Cunningham and describes his extensive history of sexual crimes. Although Cunningham was only 26 when the petition was filed, his criminal history spans the prior 10 years and includes three convictions for raping adult female strangers.

Cunningham's first felony occurred in 1980 when he was 15 years old. A woman was walking through a Seattle-area park with her three young children, when Cunningham, armed with a knife, jumped out of some bushes and commanded, "nobody move". After the woman screamed, Cunningham fled. When he was apprehended, Cunningham confessed to the assault and admitted that his purpose was to force the woman to commit oral sex upon

him. For this juvenile assault, he received a short sentence and some unspecified counseling.

In 1984, Cunningham raped a woman hitchhiker to whom he had offered a ride. Cunningham threatened to kill his victim, struck her several times, forced her to the ground, and then raped her. Cunningham pleaded guilty to second degree rape, and was sentenced to 31 months in prison.

Only 3 months after his release in November 1986, Cunningham committed his next rape. He grabbed the victim around the throat, and then forced her to have anal intercourse with him. Two months later, in April 1987, Cunningham assaulted another woman in a similar manner, forcing her to engage in additional acts of intercourse. For these actions, a jury found him guilty on two counts of second degree rape.

In an ex parte proceeding, after reviewing the petition and supporting affidavit, Judge Johnson found probable cause and ordered the clerk to issue a no-bail arrest warrant, and transfer Cunningham to the Special Commitment Center at Monroe. Judge Johnson also ruled that Cunningham "has no blanket Fifth Amendment privilege to refuse to answer any and all questions" put to him during the evaluation. Clerk's Papers, at 1183. On January 2, defense counsel brought motions to vacate the ex parte order and to allow Cunningham's participation in pretrial proceedings. The motions were denied. Cunningham was allowed to be present at his March 15, 1991, pretrial hearing.

Following jury selection, trial commenced on May 21, 1991, in front of Judge McCullough. The jury heard extensive testimony from expert witnesses for both sides. Cunningham called Dr. Steele to testify on his behalf. Based upon a records review, Dr. Steele stated that Cunningham was not suffering from a mental abnormality which would make him dangerous to women.

The State's expert was Dr. Leslie Rawlings, a licensed clinical psychologist who specializes in the assessment and treatment of sexual offenders. After reviewing Cunningham's records, Dr. Rawlings stated his diagnostic impression to a reasonable psychological certainty that Cunningham suffered from a severe paraphilia, not otherwise specified (rape). Dr. Rawlings further testified that paraphilia qualifies as a "mental abnormality" under the sex predator commitment Statute. Citing the paraphilia and several other factors, Dr. Rawlings concluded that "[i]t's my professional opinion that Mr. Cunningham is more likely than not to engage in predatory acts of sexual violence if out in the community". Report of Proceedings Cunningham (RPC) (May 21, 1991), at 39.

The jury also heard testimony from the victims involved in Cunningham's previous rape convictions. Cunningham testified on his own behalf. Over defense objections, the jury was instructed that a unanimous verdict was not required. On May 31, 1991, the jury returned an 11-to-1 verdict which found Cunningham to be a "sexually violent predator".

Both Young and Cunningham brought personal restraint petitions and motions for immediate release, which were heard by this court in January 1991. The motions for release were denied, and the court accepted jurisdiction over the petitions. The petitions were consolidated with the direct appeals from the trials.

II

EX POST FACTO LAW AND DOUBLE JEOPARDY

Petitioners argue that the Statute is unconstitutional, because it violates the double jeopardy clause and the prohibition against ex post facto laws. Generally, these clauses apply to criminal matters. Thus, if the Statute is civil rather than criminal in nature, the Statute survives this challenge. We conclude that the Statute is civil, and hold

that it does not violate either double jeopardy or the ex post facto clause.

The categorization of a particular statute as civil or criminal is largely a matter of statutory construction. *Allen v. Illinois*, 478 U.S. 364, 368, 106 S. Ct. 2988, 2991, 92 L. Ed. 2d 296 (1986); *United States v. Ward*, 448 U.S. 242, 248, 100 S. Ct. 2636, 2641, 65 L. Ed. 2d 742 (1980). The Supreme Court has adopted a 2-part analysis:

> First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.

(Citations omitted.) *Ward*, 448 U.S. at 248-49, 100 S. Ct. at 2641. Thus, we look first to the language of the Statute and the legislative history, then turn to an analysis of the purpose and effect of the statutory scheme.

Both the language of the Statute and the legislative history evidence a clear intent to create a civil scheme. The section of the law as enacted by the Legislature is entitled "Civil Commitment", Laws of 1990, ch. 3, part X, and is codified at RCW Title 71, Mental Illness.[1] Persons committed are placed in the custody of the DSHS and housed at a DSHS treatment facility. RCW 71.09.060(1); WAC 275-155. The Department of Corrections has no role in caring for committed sex predators. In addition, the provisions at issue here are compared in the text of the

[1]The title "Civil Commitment" is not properly a part of the law. Laws of 1990, ch. 3, § 1404. However, it provides evidence of the legislative intent to treat this Statute as civil.

Statute to RCW 71.05, the civil involuntary commitment act. RCW 71.09.010.

An examination of the Act's legislative history further supports a civil intent. The Legislature's final report refers to the section as "Civil Commitment", and reports that "[a] new civil commitment procedure is created for 'sexually violent predators.'" 1990 *Final Legislative Report*, 2nd SSB 6259, at 144. Moreover, the Legislature enacted a bill substantially similar to that proposed by the Governor's Task Force on Community Protection. In its report, the Task Force quite plainly recommended a civil law, because neither the criminal system nor the existing civil system could accommodate the special needs of sex predators. Report, at II-20 to II-23. In light of the Statute's language and legislative history, then, it is clear that the Legislature intended a civil statutory scheme.

This does not end our inquiry, however. We next consider whether the actual impact of the Statute is civil or criminal:

> [T]he civil label is not always dispositive. *Where a defendant has provided "the clearest proof"* that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" that the proceeding be civil, it must be considered criminal . . ..

(Italics ours.) *Allen*, 478 U.S. at 369, 106 S. Ct. at 2992 (quoting *Ward*, 448 U.S. at 248-49, 100 S. Ct. at 2641-42). In performing this inquiry, we take particular notice of the high level of proof petitioners must satisfy in order to overcome the presumption favoring the Legislature's civil designation. *Allen*, 478 U.S. at 369, 106 S. Ct. at 2992.

In *Allen*, a Fifth Amendment self-incrimination case, the Supreme Court held that an Illinois statute which provided for civil commitment of sexually dangerous persons

was properly categorized as civil, not criminal. *Allen*, at 369, 106 S. Ct. at 2992. Under the Illinois statute, a "sexually dangerous person" was one who suffered from "a mental disorder . . . coupled with criminal propensities to the commission of sex offenses". *Allen*, 478 U.S. at 366 n.1, 106 S. Ct. at 2990 n.1. In holding the statute civil, the Court found several factors significant: the Illinois Supreme Court had determined that the statute was civil in nature; the State had a statutory obligation to provide care and treatment designed to effect recovery for those committed; detainees were discharged when no longer dangerous; and, conditional release was also available. *Allen*, at 369, 106 S. Ct. at 2992. The Court summarized:

> In short, the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement.

Allen, at 370, 106 S. Ct. at 2992.

The provisions of our sexually violent predator Statute are remarkably similar to those of the Illinois statute upheld in Allen. Most notably, the Statute's definition of "sexually violent predator" is almost identical to Illinois' definition of "sexually dangerous person" -- both require a mental disorder which leads to the commission of violent sex offenses. *Compare* RCW 71.09.020(1) *with* Ill. Ann. Stat. ch. 38, ¶ 105-1.01 (Smith-Hurd 1980). Similarly, both the Illinois statute and RCW 71.09 require care and treatment for the committed individual, and provide this care in a psychiatric facility. *Compare* RCW 71.09.060(1) *and* RCW 71.09.080 *with* Ill. Ann. Stat. ch. 38, ¶ 105-8 (Smith-Hurd 1980). In addition, under both schemes, committed persons must be released as soon as they are no longer dangerous. *Compare* RCW 71.09.090(1) *with* Ill. Ann. Stat. ch. 38, ¶ 105-9 (Smith-Hurd 1980).

Petitioners argue that the Court's holding in *Allen* is distinguishable because the Illinois statute provides for commitment in lieu of serving a criminal sentence. While this is a distinguishing factor, it is by no means a contradictory one. That the State of Illinois chose to forego criminal liability for the offender's initial actions does not require Washington to do so. *See, e.g., Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991) (constitutional to both civilly commit and imprison sexually dangerous individual), *cert. denied*, 503 U.S. 952, 112 S. Ct. 1516, 117 L. Ed. 2d 652 (1992). As we discuss below, the goals of civil and criminal confinement are quite different; the former is concerned with incapacitation and treatment, while the latter is directed to retribution and deterrence. The sexually violent predator Statute is not concerned with the criminal culpability of petitioners' past actions. Instead, it is focused on treating petitioners for a current mental abnormality, and protecting society from the sexually violent acts associated with that abnormality.

Additional guidance for the determination of whether a statute is criminal was set forth by the Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68, 9 L. Ed. 2d 644 (1963). The court should consider:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . ..

(Footnotes omitted.) These factors weigh heavily on the side of a finding that this Statute is civil. Although the scheme here does involve an affirmative restraint, the civil commitment goals of incapacitation and treatment are distinct from punishment, and have been so regarded historically. Moreover, no finding of scienter is required to commit an individual who is a sexually violent predator; the determination is made based on a mental abnormality or personality disorder rather than on one's culpability. Furthermore, the Statute is necessary to serve the legitimate and vital purpose of protecting innocent potential victims.[2]

Finally, we also inquire into the purposes of the legislation. Our construction of the Statute should be that which best advances the legislative purpose. *Wichert v. Cardwell*, 117 Wn.2d 148, 151, 812 P.2d 858 (1991). The Statute promotes civil ends rather than criminal ones. The Statute before us is primarily concerned with incapacitation and treatment. Incapacitation has often been recognized as a legitimate civil goal. *See Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). Treatment is also a proper aim of civil legislation. As one commentator has remarked:

> the Sexually Violent Predator civil commitment scheme is not a method of punishment. Washington is undertaking to treat the offender pursuant to its parens patriae power and to protect the public "from the dangerous tendencies of some who are

[2]The mere fact that the State chose to establish a special commitment procedure for sex predators has no bearing on the question of whether the law is civil or criminal. As the Supreme Court stated in *Allen*, "[t]hat the State has chosen not to apply the Act to the larger class of mentally ill persons who might be found sexually dangerous does not somehow transform a civil proceeding into a criminal one". *Allen*, 478 U.S. at 370, 106 S. Ct. at 2993.

> mentally ill" pursuant to the state's police power.

Marie A. Bochnewich, Comment, *Prediction of Dangerousness and Washington's Sexually Violent Predator Statute*, 29 Cal. W. L. Rev. 277, 278 (1992).

In contrast, the Supreme Court has said repeatedly that retribution and deterrence are punitive, and thus are the goals of criminal law. *United States v. Halper*, 490 U.S. 435, 448, 109 S. Ct. 1892, 1901-02, 104 L. Ed. 2d 487 (1989); *Mendoza-Martinez*, 372 U.S. at 168, 83 S. Ct. at 567-68; *Bell v. Wolfish*, 441 U.S. 520, 539 n.20, 99 S. Ct. 1861, 1874 n.20, 60 L. Ed. 2d 447 (1979). Thus, the Court reasoned:

> a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

Halper, at 448, 109 S. Ct. at 1902; *accord Austin v. United States*, 509 U.S. 602, 608-613, 113 S. Ct. 2801, 2805-07, 125 L. Ed. 2d 488 (1993). This court has applied similar reasoning:

> [T]he determinative factors for resolving a double jeopardy claim are whether [the sanction] has a rational connection to some purpose other than retribution or deterrence, and whether the sanction appears excessive in relation to the alternative purpose.

O'Day v. King Cy., 109 Wn.2d 796, 817, 749 P.2d 142 (1988), (citing *Mendoza-Martinez*, 372 U.S. at 168-69, 83 S. Ct. at 567-68). Absent any indication that a criminal purpose was intended, or actually served by the statute, the stated civil goals of the Legislature are controlling. *See Mendoza-Martinez*, 372 U.S. at 168-69, 83 S. Ct. at 567-68.

In sum, we conclude that the sexually violent predator Statute is civil, not criminal, in nature. The language and history of the Statute so indicate, as do its purposes and effect. Petitioners have failed "to provide the clearest proof" to the contrary.

Turning to the specific challenges made here, petitioners argue that RCW 71.09 violates the ex post facto clause. The prohibition against ex post facto laws is expressly leveled against states in U.S. Const. art. 1, § 10.

> A law violates the ex post facto prohibition if it aggravates a crime or makes it greater than it was when committed; permits imposition of a different or more severe punishment than was permissible when the crime was committed; or, changes the legal rules to permit less or different testimony to convict the offender than was required when the crime was committed.

State v. Edwards, 104 Wn.2d 63, 70-71, 701 P.2d 508 (1985) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798)). The purposes of the prohibition are to give individuals fair warning of the effect of legislative acts, and to restrict the power of the State to impose arbitrary or vindictive legislation. *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S. Ct. 960, 963-65, 67 L. Ed. 2d 17 (1981).

The ex post facto clause has been interpreted to apply only to criminal matters. *Calder v. Bull*, *supra*; *see* William W. Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. Chi. L. Rev. 539 (1946-1947), *cited in* 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 2.4 n.9 (1986). In addition, at least one court has held that sexual psychopath proceedings did not involve the ex post facto prohibition because it was not a criminal remedy. *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 1253, 232 S.W.2d 897, 24 A.L.R.2d

340 (1950). Because the Statute is civil, therefore, the ex post facto prohibition does not apply.

Petitioners argue further that the prohibition against double jeopardy is violated by the Act. The Fifth Amendment provides, in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb". The double jeopardy clause prohibits multiple punishment for the same offense. *Halper*, 490 U.S. at 440, 109 S. Ct. at 1897; *O'Day*, 109 Wn.2d at 816, 749 P.2d 142. This prohibition "has deep roots in our history and jurisprudence." *Halper*, at 440, 109 S. Ct. at 1897.

In general, the prohibition against double jeopardy applies only to criminal measures:

> "[a] double jeopardy violation does not occur simply because two adverse consequences stem from the same act." *In re Mayner*, [107 Wn.2d 512, 730 P.2d 1321 (1986)] at 521. Double jeopardy does not apply "unless the sanction sought to be imposed in the second proceeding is punitive in nature so that the proceeding is essentially criminal." *Beckett v. Department of Social & Health Servs.*, 87 Wn.2d 184, 188, 550 P.2d 529 (1976) [*overruled on other grounds by Dunner v. McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984)]; *see Emory v. Texas Bd. of Med. Examiners*, 748 F.2d 1023, 1026 (5th Cir. 1984).

O'Day, 109 Wn.2d at 816-17, 749 P.2d 142. The prohibition has, however, been found to be implicated in some circumstances by "civil" penalties as well as "criminal". In *Halper*, the Supreme Court found that a civil fine imposed in a Medicare fraud case after a criminal sentence had been served violated double jeopardy. *Halper*, at 452, 109 S. Ct. at 1903-04. The Supreme Court focused on whether the sanction was remedial or punitive in nature, noting that the

purpose actually served by the sanction, rather than the underlying nature of the proceeding, determined the issue. *Halper*, at 447 n.7, 109 S. Ct. at 1901 n.7. The court held that a "civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Halper*, at 448, 109 S. Ct. at 1901-02.

Here, as noted above, the statutory scheme has not been shown to serve any punitive goal; indeed, it does not. Moreover, in *Halper*, the Court inquired as to the remedial function of the civil penalties, and questioned if the Government could impose a monetary penalty after a criminal sentence had been exacted. Essentially, *Halper* ruled that the State may not bring a separate civil action based on criminal conduct that is not rationally related to a legitimate civil goal. *Halper*, at 449, 109 S. Ct. at 1902. Incapacitation and treatment, though, are legitimate civil goals, as evidenced by the ordinary civil commitment law. *See Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). Therefore, enforcement of the Act does not violate double jeopardy.

III

SUBSTANTIVE DUE PROCESS

Petitioners argue that substantive constitutional requirements are violated by the Statute, and that it should be overturned. The propriety of the statutory scheme here is a matter of first impression. Although somewhat different from our sex predator Statute, the United States Supreme Court has upheld statutory schemes where sexual offenders were committed in lieu of serving their criminal sentences. Until 1984, and the passage of sentencing reform, Washington utilized such a scheme. Former RCW 71.06. In *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 60 S. Ct. 523, 84 L. Ed. 744, 126 A.L.R. 530 (1940), the Court refused to invalidate a "psychopathic personality" proceeding. As noted earlier, the Court has upheld

confinement under the Illinois Sexually Dangerous Persons Act. *Allen v. Illinois*, 478 U.S. 364, 374, 106 S. Ct. 2988, 2994-95, 92 L. Ed. 2d 296 (1986).

In their substantive challenges to the Statute, petitioners argue that it does not serve a valid state purpose. They further argue that the Statute violates due process because petitioners are not mentally ill and that constitutionally required treatment is precluded due to the conditions of confinement. As such, they argue that the Statute authorizes unconstitutional preventive detention. Finally, petitioners argue that evidence of a recent overt act which proves dangerousness is mandated. Although we agree that evidence of an overt act may be required in *limited* circumstances, we conclude that there are no substantive constitutional impediments to the sexually violent predator scheme.

1. Strict Scrutiny.

The constitution requires that a person shall not be deprived of life, liberty, or property without due process of law. U.S. Const. amends. 5, 14; Const. art. 1, § 3. An individual's liberty interest is important and fundamental. *United States v. Salerno*, 481 U.S. 739, 750, 107 S. Ct. 2095, 2103, 95 L. Ed. 2d 697 (1987). When a state's laws impinge on fundamental rights, such as liberty, they are constitutional only if they further compelling state interests, and are narrowly drawn to serve those interests. *State v. Farmer*, 116 Wn.2d 414, 429, 805 P.2d 200, 812 P.2d 858 (1991); *In re Schuoler*, 106 Wn.2d 500, 508, 723 P.2d 1103 (1986).

Applying the strict scrutiny test to the Statute as a whole, it is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions. *Addington v. Texas*, 441 U.S. 418, 426, 99 S. Ct. 1804, 1809-10, 60 L. Ed. 2d 323 (1979); *Vitek v. Jones*, 445 U.S. 480, 495, 100 S. Ct. 1254, 1264-65, 63 L. Ed. 2d 552 (1980). The Supreme Court has stated that:

> The state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.

Addington, 441 U.S. at 426, 99 S. Ct. at 1809; *see also Salerno*, 481 U.S. at 748-49, 107 S. Ct. at 2102 ("the government may detain mentally unstable individuals who present a danger to the public"). Here, petitioners Young and Cunningham were diagnosed with a mental disorder and share a lengthy criminal history of violent rape. Other individuals encompassed under the commitment law share similar profiles. In such circumstances, the Court has consistently upheld civil commitment schemes. *See Addington v. Texas*, *supra*; John Q. La Fond, *An Examination of the Purposes of Involuntary Civil Commitment*, 30 Buff. L. Rev. 499, 513 (1981).

Any criticism of the Statute, then, would have to be based on the requirement that it be narrowly drawn. We will address petitioners' various "least restrictive alternative" arguments in subsequent sections of this opinion.

2. Mentally Ill and Dangerous.

Petitioners argue that the Statute allows the State to hold individuals without proving that the person is both mentally ill and dangerous. In *Addington*, the Supreme Court held that a person must be both mentally ill[3] and dangerous

[3]Although the Supreme Court in *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) used the term "mentally ill" almost exclusively, the Court has always used the term "mentally ill" interchangeably with "mentally disordered". *See, e.g., Allen v. Illinois* (478 U.S. 364, 106 S. Ct. 2988) (upholding an Illinois statute requiring both a "mental disorder" and dangerousness); *Addington v. Texas* (441 U.S. 418, 99 S. Ct. 1804) (using both terms). Indeed, the terms are largely synonymous. *Longman Dictionary of Psychology and Psychiatry* 451 (1984).

for a civil commitment to be permissible under the due process clause of the constitution. *Accord, e.g., Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). The sexually violent predator Statute satisfies this due process standard.

The Statute clearly requires proof of a "mental abnormality or personality disorder" for civil commitment. RCW 71.09.020(1). Although "mental abnormality" is not defined in the American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (3d rev. ed. 1987) (*DSM-III-R*),[4] the Legislature has given it a meaning which incorporates a number of recognized mental pathologies:

> In using the concept of "mental abnormality" the legislature has invoked a more generalized terminology that can cover a much larger variety of disorders. Some, such as the paraphilias, are covered in the *DSM-III-R*; others are not. The fact that pathologically driven rape, for example, is not yet listed in the *DSM-III-R* does not invalidate such a diagnosis. The *DSM* is, after all, an evolving and imperfect document. Nor is it sacrosanct. Furthermore, it is in some areas a political document whose diagnoses are based, in some cases, on what American Psychiatric Association ("APA") leaders consider to be practical realities. *What is critical for our purposes is that psychiatric and psychological*

[4]The *DSM-III-R* is a document frequently relied upon by courts in determining the acceptance of psychiatric diagnosis. *E.g., Heller v. Doe*, 509 U.S. 312, 318-324, 113 S. Ct. 2637, 2642-44, 125 L. Ed. 2d 257 (1993); *State v. Hutsell*, 120 Wn.2d 913, 917, 845 P.2d 1325 (1993); *In re Rice*, 118 Wn.2d 876, 890-91, 828 P.2d 1086, *cert. denied*, 506 U.S. 958, 113 S. Ct. 421, 121 L. Ed. 2d 344 (1992).

> *clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM.*

(Italics ours.) Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget Sound L. Rev. 709, 733 (1992). In both Young's and Cunningham's respective trials, expert witnesses for petitioners and the State were competent and able to offer testimony on the mental pathologies underlying the sex predator condition. These same experts testified that the statutory term "mental abnormality" was nearly identical to the notion of "mental disorder" as defined in the *DSM-III-R*.[5]

Both Young and Cunningham were primarily diagnosed with a mental disorder known as "paraphilia". Classified as a sexual disorder, the essential features of a paraphilic mental illness are "recurrent intense sexual urges and sexually arousing fantasies generally involving either (1) nonhuman objects, (2) the suffering or humiliation of oneself or one's partner (not merely simulated), or (3) children or other nonconsenting persons". *DSM- III-R*, at 279. The *DSM-III-R* contains an extensive discussion of paraphilia; none of the experts at Young's and Cunningham's commitment trials challenged the acceptance of this diagnostic category.

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[5]Despite the testimony at trial, petitioners suggest that a "mental abnormality" is not a true mental illness because it is a term coined by the Legislature, rather than the psychiatric and psychological community. This argument is meritless. Over the years, the law has developed many specialized terms to describe mental health concepts. For example, the legal definitions of "insanity" and "commitment" vary substantially from their psychological and psychiatric counterparts. The *DSM-III-R* explicitly recognizes this fact, noting that the scientific categorization of a mental disorder may not be "wholly relevant to legal judgments". *DSM-III-R*, at xxix.

The specific diagnosis offered by the State's experts at each commitment trial was "paraphilia not otherwise specified." This is a residual category in the *DSM-III-R* which encompasses both less commonly encountered paraphilias and those not yet sufficiently described to merit formal inclusion in the *DSM-III-R*. *DSM-III-R*, at 280. As the testimony reflected, paraphilias are classified as either mild, moderate or severe. Young and Cunningham were both diagnosed with a severe paraphilia; i.e. "[t]he person has repeatedly acted on the paraphilic urge". *DSM-III-R*, at 281.

The expert testimony further reflected that both Young and Cunningham could be classified within the "paraphilia not otherwise specified" category as suffering from "rape as paraphilia". According to the seminal article on this mental disorder, portions of which were read into testimony at both trials, certain patterns of rape fall into this diagnosis:

> Clinical interviews of rapists, however, provide support for the classification of rape as a paraphilia, because many individuals report having recurrent, repetitive, and compulsive urges and fantasies to commit rapes. These offenders attempt to control their urges, but the urges eventually become so strong that they act upon them, commit rapes, and then feel guilty afterwards with a temporary reduction of urges, only to have the cycle repeat again. This cycle of ongoing urges, attempts to control them, breakdown of those attempts, and recurrence of the sex crime is similar to the clinical picture presented by exhibitionists, voyeurs, pedophiles, and other traditionally recognized categories of paraphiliacs.

Gene G. Abel & Joanne-L. Rouleau, *The Nature and Extent of Sexual Assault, in Handbook of Sexual Assault: Issues,*

Theories and Treatment of the Offender 9, 18 (W.L. Marshall, et al. eds., 1990) (hereinafter *Handbook of Sexual Assault*).[6] The article goes on to state that "[s]uch a categorization raises the issue of the offender's need for psychiatric and psychological treatment before he can gain control over his sexual assaultiveness". *Handbook of Sexual Assault*, at 20. It recognizes that "[i]n our culture, this has meant that not only must the individual so categorized serve his time for his illegal act of sexual assault, but he must also serve time receiving psychiatric and psychological treatment for his paraphilia". *Handbook of Sexual Assault*, at 20.

In Young's trial, the State's expert testified that Young also suffered from an "anti-social personality disorder". Like paraphilia, anti-social personality disorder is classified as a mental disorder in the *DSM-III-R*. In general, a personality disorder diagnosis is appropriate "only when *personality traits* are inflexible and maladaptive and cause either significant functional impairment or subjective distress". *DSM-III-R*, at 335. Anti-social personality disorder is characterized by a long-term pattern of irresponsible and anti-social behavior. *DSM-III-R*, at 342.

Petitioners nonetheless argue that the Statute does not address a mental disorder because treatment of sex offenders is impossible. Indeed, the Legislature adopted specific findings that "sexually violent predators . . . have antisocial personality features which are unamenable to existing mental illness treatment", and that "the prognosis for curing sexually

[6]According to the expert testimony, rape as paraphilia falls within the *DSM-III-R* category of "paraphilia, not otherwise specified". CPY (Feb. 27, 1991), at 132. Dr. Steele, an expert for petitioners who testified at both trials, agreed that rape is a paraphilia. CPY (Mar. 1, 1991), at 148; CPC (May 23, 1991), at 66. The article by Doctors Abel and Rouleau reviews the pertinent scientific literature and concludes that "[t]he weight of scientific evidence, therefore, supports rape of adults as a specific category of paraphilia". *Handbook of Sexual Assault*, at 19. Moreover, the *DSM-III-R* specifies violent rape as a symptom of "paraphilia sexual sadism". *DSM-III-R*, at 287-88.

violent offenders is poor". RCW 71.09.010. Moreover, as argued by amicus, it is commonly believed that violent sex offenders cannot be successfully treated, especially involuntarily. Brief of Amicus Curiae Washington State Psychiatric Association, at 10; *see also ABA Criminal Justice Mental Health Standards*, at 7-8.1 n.16 (1989).

There are two flaws in this line of argument. First, the mere fact that an illness is difficult to treat does not mean that it is not an illness.[7] For example, some forms of schizophrenia cannot be treated, but the diagnosis nonetheless remains a valid one. The Legislature should not be admonished for its honest recognition of the difficulties inherent in treating those afflicted with the mental abnormalities causing the sex predator condition.

Second, petitioners have failed to show that the *specific* conditions of confinement are incompatible with treatment. As the Supreme Court noted in *Allen*:

> Petitioner has not demonstrated, and the record does not suggest, that "sexually dangerous persons" in Illinois are confined under conditions incompatible with the State's asserted interest in treatment. Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen with is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case.

Allen, 478 U.S. at 373, 106 S. Ct. at 2994. Similarly, the Washington Statute provides for treatment, and petitioners

[7]It is by no means clear that the mental abnormalities and personality disorders underlying the sex predator condition are "untreatable". Of the experts who testified at trial, many reported that a significant portion of their practices were devoted to treating sex offenders. Also, the *Handbook of Sexual Assault* contains six chapters discussing the treatment of sex offenders. *See Handbook of Sexual Assault*, at 279-382.

have failed to prove that this goal cannot be effectuated under the Statute's terms.

Due process concerns are similarly satisfied because the sexually violent predator Statute requires dangerousness as a condition for civil commitment. RCW 71.09.020(1). The Court has said that mental illness is insufficient, standing alone, to justify confinement. *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 2493-94, 45 L. Ed. 2d 396 (1975). Instead, there must be a showing that the person is dangerous to the community. *O'Connor*, 422 U.S. at 582-83, 95 S. Ct. at 2497-98 (Burger, C.J., concurring). Similarly, this court has often said that "the only basis for involuntary commitment is dangerousness". *In re Patterson*, 90 Wn.2d 144, 153, 579 P.2d 1335 (1978), *overruled on other grounds by Dunner v. McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984); *In re Levias*, 83 Wn.2d 253, 257, 517 P.2d 588 (1973), *overruled on other grounds by Dunner v. McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984).

Here, the Statute inherently applies only to dangerous offenders. Under the very definitions of the Statute, only "sexually violent offenders" -- those "likely to engage in predatory acts of sexual violence" -- are subject to its provisions. RCW 71.09.020(1). Individuals involuntarily committed under the Statute possess a proven history of rape and sexually motivated violence. Their likelihood of re-offense is extremely high. According to supplemental authority submitted by petitioners themselves and specific to the sex predator program, "[u]sing theoretically relevant and empirically tested predictors, predictive accuracy [of sexual recidivism] can realistically be expected to be in the 80% range". Dr. Vernon Quinsey, *Review of the Washington State Special Commitment Center Program for Sexually Violent Predators*, at 9 (appended to Wash. State Inst. for Pub. Policy, *Review of Sexual Predator Program: Community Protection Research Project* (Feb. 1992)); *see also Heller v. Doe*, 509 U.S. 312, 323, 113 S. Ct. 2637, 2644 (1993)

("Previous instances of violent behavior are an important indicator of future violent tendencies.").[8] Thus, there is no doubt that commitment is predicated on dangerousness under the Statute.[9]

In short, the Statute satisfies the due process concerns outlined in *Addington v. Texas* (441 U.S. 418, 99 S. Ct. 1804). Expert testimony in both the Young and Cunningham trials diagnosed petitioners with a mental disorder, and informed the jury of the dangerousness arising out of that disorder.[10]

3. Nature and Duration.

In a related issue, the Supreme Court has stated that due process "'requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.'" *Jones v. United States*, 463 U.S. 354, 368, 103 S. Ct. 3043, 3051, 77 L. Ed. 2d 694 (1983) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S.

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[8]Although predictions of future dangerousness are certainly less than perfect, this court has previously decided that predictions of dangerousness do not violate due process. *In re Harris*, 98 Wn.2d 276, 280-81, 654 P.2d 109 (1982).

[9]The dissent seriously underplays the quantum of proof necessary to meet the dangerousness prong of the sex predator statute. The State must do far more than merely reprove a past criminal act, or present testimony from someone who thinks that individual is still dangerous. See dissent, at 62-65. Instead, the statute requires *proof beyond a reasonable doubt* that the person has been convicted or charged with a crime of sexual violence, and suffers from a mental abnormality or personality disorder "which makes the person likely to engage in predatory acts of sexual violence". RCW 71.09.020(1). In the current cases, testimony came from licensed mental health professionals familiar with petitioners' past conduct and current mental profiles.

[10]Citing a handful of law review articles, the dissent claims that RCW 71.09 is unrelated to any known mental illness. In making this claim, however, the dissent does not respond to the extensive expert testimony presented at both Young's and Cunningham's respective trials.

Ct. 1845, 1858, 32 L. Ed. 2d 435 (1972)). Thus, an inquiry into the purposes of the Statute is required.

Two underlying purposes for commitment are often advanced -- treatment and incapacitation. *See* La Fond, *supra*. The Statute at issue here serves both purposes. The Statute requires that constitutionally mandated care and treatment be provided, RCW 71.09.080, and charges DSHS with the responsibility of providing "control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large". RCW 71.09.060(1). DSHS has promulgated regulations to effect this purpose. An individualized treatment plan is developed and maintained for each person committed under the Statute, including:

> (a) A description of a person's specific treatment needs;
>
> (b) An outline of intermediate and long-range treatment goals, with a projected timetable for reaching the goals;
>
> (c) The treatment strategies for achieving the treatment goals;
>
> (d) A description of [sexual predator program] staff persons' responsibility; and
>
> (e) Criteria for recommending to the court whether a person should be released from the [sexual predator program].

WAC 275-155-040(1). The regulations governing the program make it clear that committed individuals shall "[r]eceive adequate care and individualized treatment". WAC 275-155-050(3)(a).

The purpose of incapacitation is also well served by this Statute. The task force responsible for drafting the legislation initially noted that an additional goal of the program was to "confine repeat violent offenders who

present an extreme safety risk". *Report*, at I-1. Sexually violent predators, those who are adjudged likely to engage in acts of violence, are housed in a special commitment center which must be located within a correctional institution. The record reflects that the current facility is rated maximum security. Given the nature of sexually violent predators, it would not be safe to house them in a less secure setting. Thus, it appears that the commitment is related to the purpose of the Statute.

Finally, petitioners argue that they are constitutionally entitled to the least restrictive alternatives to confinement available.[11] It is true that those who are civilly committed must be treated differently than criminals. The Supreme Court has said this explicitly:

> Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.

Youngberg v. Romeo, 457 U.S. 307, 321-22, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28 (1982). Nevertheless, we need not place undue limitations on the administration of state institutions. *Romeo*, at 322, 102 S. Ct. at 2461-62.

In light of these considerations, giving the presumption of correctness to "decisions made by the appropriate professional" (here, DSHS), individuals who have been involuntarily committed have the right to "conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests". *Romeo*, at 324, 102 S. Ct. at 2462. Here, the dangerousness of committed sex predators justifies a secure confinement facility. Moreover,

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[11] A related argument is advanced that petitioners have a right to treatment. The Statute provides that any constitutional requirements concerning care and treatment must be met. RCW 71.09.080.

the regulations governing the commitment facility specifically provide a wider range of privileges than those associated with a prison setting:

> (3) A person the court commits to the SPP [sexual predator program] *shall*:
>
> (a) Receive adequate care and individualized treatment;
>
> (b) Be permitted to wear the committed person's own clothes and keep and use the person's personal possessions, except when deprivation of possessions is necessary for the person's protection and safety, the protection and safety of others, or the protection of property within the SPP;
>
> (c) Be permitted to accumulate and spend a reasonable amount of money in the person's SPP account;
>
> (d) Have access to reasonable personal storage space within SPP limitations;
>
> (e) Be permitted to have approved visitors within reasonable limitations;
>
> (f) Have reasonable access to a telephone to make and receive confidential calls within SPP limitations; and
>
> (g) Have reasonable access to letter writing material and to:
>
> (i) Receive and send correspondence through the mail within SPP limitations; and
>
> (ii) Send written communication regarding the fact of the person's commitment.

(Italics ours.) WAC 275-155-050.

There is no evidence in the record addressing either the actual conditions of confinement, or the quality of treatment. These issues are not currently before the court. Facially, the Statute and associated regulations suggest that the nature and duration of commitment is compatible with the purposes of the commitment.

4. *Foucha v. Louisiana.*

Petitioners next argue that the Supreme Court's recent decision in *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) forbids the civil commitment of sexually violent predators because it constitutes unconstitutional preventive detention. As is patently obvious, however, both the facts and the statute in *Foucha* differ significantly from those presented here. Contrary to petitioner's claim, our holding is consistent with and supportive of *Foucha*.

In *Foucha*, the Court overturned a Louisiana statute dealing with insanity acquittees because the release procedures were inadequate. The Court described the statute as follows:

> When a defendant in a criminal case pending in Louisiana is found not guilty by reason of insanity, he is committed to a psychiatric hospital unless he proves that he is not dangerous. This is so whether or not he is then insane. After commitment, if the acquittee or the superintendent begins release proceedings, a review panel at the hospital makes a written report on the patient's mental condition and whether he can be released without danger to himself or others. If release is recommended, the court must hold a hearing to determine dangerousness; the acquittee has the burden of proving that he is not dangerous. If found to be dangerous, the acquittee may be returned to the mental

> institution whether or not he is then mentally ill.

Foucha, 504 U.S. at 73, 112 S. Ct. at 1781-82. Four years after Terry Foucha had been committed, following an acquittal by reason of insanity of aggravated burglary and illegal discharge of a firearm, the superintendent of the facility where he was held recommended that he be released. The review panel reported that "there had been no evidence of mental illness since admission". *Foucha*, 504 U.S. at 74, 112 S. Ct. at 1782.

The trial court heard medical testimony that Foucha was probably in remission from what had been a temporary condition -- likely a drug induced psychosis. The court heard further testimony that Foucha had an "antisocial personality", that such condition was not a mental illness, and that he had no other mental disorders. However, an ultimate medical determination about his dangerousness could not be made. Instead, a doctor testified only that he could not "certify that [Foucha] would not constitute a menace to himself or others if released". *Foucha*, 504 U.S. at 74-75, 112 S. Ct. at 1782. Based solely on this equivocal testimony, the trial court returned him to the mental institution.

The United States Supreme Court reversed, holding that absent a determination of current mental illness and dangerousness, continued confinement under the Louisiana scheme was impermissible. *Foucha*, 504 U.S. at 85-86, 112 S. Ct. at 1788-89. The Court relied on three reasons to overturn the confinement and the underlying statute. First, the statute did not meet the minimal due process requirement "that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." *Foucha*, 504 U.S. at 79, 112 S. Ct. at 1785. The State of Louisiana was continuing to confine Foucha in a psychiatric facility even though he was not suffering from a mental disease or illness. Second, the statute did not provide constitutionally adequate procedures. *Foucha*, 504 U.S. at

79, 112 S. Ct. at 1785. Finally, the Court determined that Foucha was not confined under any previously recognized authority of the State. It recognized three ways in which an individual could be confined: by the criminal justice system; pursuant to civil commitment law; or under the narrow circumstances set forth in *United States v. Salerno*, *supra*. *Foucha*, 504 U.S. at 80, 112 S. Ct. at 1785-86.

The Statute here withstands the scrutiny required in Foucha. As explained above, the sexually violent predator Statute is narrowly tailored to serve a compelling state interest. Also, before a person can be civilly committed, the State must prove that the individual is mentally ill[12] and dangerous -- a condition that was satisfied in Young's and Cunningham's respective trials. As such, the sexually violent predator commitment scheme falls squarely within *Foucha's* definition of constitutionally permissible civil commitment. *See Foucha*, 504 U.S. at 77-82, 112 S. Ct. at 1784-86. "The State may also confine a mentally ill person if it shows 'by

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[12]Petitioners raise the issue that, under *Foucha*, it is impermissible to civilly commit someone who has an "antisocial personality", because that condition is not a mental disorder. According to petitioners, the sex predator Statute violates this holding. This argument belies a careless reading of the *Foucha* facts. First, the condition in *Foucha* was an "antisocial personality". This condition falls within the *DSM-III-R* section entitled "V Codes for Conditions Not Attributable to a Mental Disorder" and is formally designated "antisocial behavior"; it is not a mental disorder. As such, anti-social behavior cannot form the basis for civil commitment. *Foucha v. Louisiana* (504 U.S. 71, 112 S. Ct. 1780). The sex predator Statute, however, requires proof of a "personality *disorder*" as one of the alternative means of commitment. (Italics ours.) RCW 71.09.020. Unlike "antisocial behavior", an "antisocial personality disorder" is a recognized mental disorder which is defined in the *DSM-III-R*, at 342. Second, petitioners ignore the limitations inherent in the Court's discussion of this issue. *Foucha* came before the Court on a limited trial record. As such, the Court pointed out several times that its discussion on the status of Foucha's condition as a mental illness was "according to the testimony given at the hearing in the trial court". *Foucha*, 504 U.S. at 79, 112 S. Ct. at 1785.

clear and convincing evidence that the individual is mentally ill and dangerous'". *Foucha*, 504 U.S. at 80, 112 S. Ct. at 1786 (quoting *Jones*, 463 U.S. at 362, 103 S. Ct. at 3048).

In addition, the sex predator Statute does not suffer from the procedural infirmities that rendered Louisiana's insanity acquittee scheme unconstitutional. Under the Washington law, the State must satisfy the highest burden of proof to civilly commit a sex predator. A higher burden of proof "tends to equalize the risks of an erroneous determination that the subject of a commitment proceeding has the condition in question". *Heller*, 509 U.S. at 322, 113 S. Ct. at 2644. Whereas Louisiana attempted to continue Foucha's confinement without claiming that he suffered from a mental illness, the Washington Statute makes proof of a *current* mental disorder a condition of commitment. Also, in regard to dangerousness, Louisiana placed the burden on Foucha, while the Washington Statute places the burden on the State. In contrast to the Louisiana statute, the sexually violent predator Statute is the type of "sharply focused scheme" which the Supreme Court called for in *Foucha*. 504 U.S. at 81, 112 S. Ct. at 1786.

Our interpretation of the holding in *Foucha* finds support in Justice O'Connor's crucial concurring opinion. In providing the necessary fifth vote which formed the majority, Justice O'Connor carefully pointed out the limitations of that holding:

> I write separately, however, to emphasize that the Court's opinion addresses only the specific statutory scheme before us, which broadly permits indefinite confinement of sane insanity acquittees in psychiatric facilities.

Foucha, 504 U.S. at 86-87, 112 S. Ct. at 1789 (O'Connor, J., concurring). Where the incapacitation is more closely tailored to "reflect pressing public safety concerns related to the acquittee's continuing dangerousness", continued

confinement may be permitted. *Foucha*, 504 U.S. at 87-88, 112 S. Ct. at 1789 (O'Connor, J., concurring).

The dissent claims that the sex predator program constitutes "preventative detention" because the statute is not "civil commitment" and sex predators are "detained" for an indefinite period of time. We reject this characterization. First, the sex predator statute does not rely upon the *Salerno* line of cases. It falls comfortably within the "civil commitment" category discussed in *Foucha* because the State must prove both a mental illness and dangerousness. Second, civil commitments are not subject to any rigid time limit. Rather, the commitment is tailored to the nature and duration of the mental illness. Finally, unlike pretrial detainees, those committed under the sex predator statute have been through a full trial with a complete range of procedural protections. In short, despite the dissent's protests to the contrary, the sex predator statute does not create any ominous "dangerousness court", but rather follows traditional civil commitment norms.

Even though petitioners potentially face a long period of civil commitment, the sexually violent predator Statute is wholly sustainable. Those committed under the sex predator Statute have been through a full trial with a complete range of procedural protections. From this trial, a jury has determined that the State has met the highest burden possible -- beyond a reasonable doubt -- in proving that the committed individual suffers from a mental abnormality which renders him a danger to the community. Although the period of confinement is not predetermined, the Statute's release provisions provide the opportunity for periodic review of the committed individual's current mental condition and continuing dangerousness to the community.

In sum, the circumstances of the *Foucha* case clearly dictated the result reached by the United States Supreme Court. The case before us deals with vastly different facts

and law, and is wholly consistent with the principles enunciated in *Foucha*.

5. Overt Act.

Petitioners next argue that the constitution requires evidence of a recent overt act to prove dangerousness, relying on *In re Harris*, 98 Wn.2d 276, 654 P.2d 109 (1982). Harris had been detained under RCW 71.05.150(1)(a), which provides for short-term detention for evaluation and treatment if "a person, as a result of a mental disorder, presents a likelihood of serious harm to others or himself". *Harris*, at 279, 654 P.2d 109. The phrase "likelihood of serious harm" is defined explicitly in RCW 71.05.020(3), as follows:

> (a) A substantial risk that physical harm will be inflicted by an individual upon his own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on one's self, (b) a substantial risk that physical harm will be inflicted by an individual upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm, or (c) a substantial risk that physical harm will be inflicted by an individual upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others[.]

The definition contains the inference that the harm at issue be evidenced by some act or behavior. The court noted that "such evidence must be recent to be meaningful". *Harris*, at 284, 654 P.2d 109. Thus, interpreting RCW 71.05, this court held that involuntary commitment was only permitted upon:

> a showing of a substantial risk of physical harm as evidenced by a recent overt act. This

> act may be one which has caused harm or creates a reasonable apprehension of dangerousness.

Harris, at 284-85, 654 P.2d 109.

However, the court rejected an additional requirement of "imminent danger", relying primarily on statutory interpretation. Harris, at 283-84, 654 P.2d 109. We compared the emergency detention provisions contained in RCW 71.05.150(2) -- which *do* require that the likelihood of serious harm be imminent, with the remaining procedures contained in RCW 71.05 -- which do *not* impose the condition of imminence. *Harris*, at 282, 654 P.2d 109. We concluded that the omission expressed the Legislature's intent not to impose the condition of imminence. *Harris*, at 282, 654 P.2d 109. In addition, the court noted:

> the practical effect of being placed in the hospital will usually eliminate the "imminence" of one's dangerousness. If we were to require "imminent danger" as a requirement of continued commitment, we would be creating a standard that (in many cases) would invalidate commitment as soon as it occurs. . . . A standard of "imminent danger" for all commitments would be impracticable.

Harris, at 284, 654 P.2d 109.

In many cases, sexually violent predators are incarcerated prior to commitment. *Cf. In re LaBelle*, 107 Wn.2d 196, 204, 728 P.2d 138 (1986). For incarcerated individuals, a requirement of a recent overt act under the Statute would create a standard which would be impossible to meet. Other jurisdictions have rejected the precise argument made by petitioners because it creates an impossible condition for those currently incarcerated. *See People v. Martin*, 107 Cal. App. 3d 714, 725, 165 Cal. Rptr.

773 (1980). We agree that "[d]ue process does not require that the absurd be done before a compelling state interest can be vindicated." *Martin*, 107 Cal. App. 3d at 725, 165 Cal. Rptr. 773. Indeed, in drafting the Statute, the Legislature expressly noted that the involuntary commitment statute, RCW 71.05, was an inadequate remedy because confinement prevented any overt act. RCW 71.09.010. We conclude that where the individual is currently incarcerated no evidence of a recent overt act is required.

However, where an individual has been released from confinement on a sex offense (as referenced in RCW 71.09.030) and lives in the community immediately prior to the initiation of sex predator proceedings, the above rationale does not apply. Under *Harris*, proof of a recent overt act is necessary to satisfy due process concerns when an individual has been released into the community. 98 Wn.2d at 284, 654 P.2d 109. When an individual has been in the community, the State has the opportunity to prove dangerousness through evidence of a recent overt act. We construe statutes to render them constitutional. Therefore, we hold that the State must provide evidence of a recent overt act in accord with *Harris* whenever an individual is not incarcerated at the time the petition is filed. For non-incarcerated individuals, a sex predator petition under RCW 71.09.030 must include an allegation of a recent overt act sufficient to establish probable cause when considered in conjunction with the other factors listed in RCW 71.09.040.

Petitioner Cunningham was released from prison and living in the community for some 4 ½ months before the State filed a sex predator petition. He was gainfully employed as an assistant engineer on a ship and was planning to go to sea for a period of time. The State did not allege a recent overt act in its petition, nor did the State offer such evidence at Cunningham's trial. We find, therefore, that the proof presented at trial was insufficient and Cunningham's commitment as a sex predator is hereby reversed.

In sum, the Statute does not violate substantive due process. The State's interest in preventing the sort of harm exacted by sexually violent predators is clearly compelling. The Statute complies with due process because it conditions civil commitment on a finding of both a mental disorder and dangerousness. The Supreme Court's opinion in *Foucha* does not alter this long-established law, nor forbid Washington's efforts to ameliorate an important societal problem. As noted by the chair of the task force when he transmitted the *Report* to the Governor, the Statute is "a serious response commensurate with the harm caused". *Report*, Letter of transmittal from Norm Maleng to The Hon. Booth Gardner (Nov. 28, 1989).

IV

PROCEDURAL DUE PROCESS

Petitioners contend that the Statute must be overturned because it deprives them of their liberty without adequate procedural protections and denies them equal protection. Several procedural infirmities are alleged: that the ex parte finding of probable cause denies meaningful predeprivation due process, that consideration of less restrictive alternatives to confinement is necessary, that the burden of proof at trial is inadequate because the jury need not be unanimous, that the Statute is void for vagueness, and that petitioners were unconstitutionally denied a right to remain silent.[13]

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[13]Petitioners argue additionally that the Statute is facially invalid because of defects in the procedures for release. The release provisions of the two civil commitment statutes differ. The maximum period of commitment under RCW 71.05 is 180-day intervals. At the expiration of each period, the detainee is entitled to the full range of procedural protections, including jury trial. RCW 71.05.310, .320(2). The confinement interval for sex predators is 1 year, and after one petition has been rejected, the burden shifts to the detainee to show he or she is safe to be at large. RCW 71.09.090-.100. Because neither petitioner here has applied for release, the record before the court is insufficient to decide if

1. Probable Cause Hearing.

Petitioners argue that an adversarial probable cause hearing is required by due process considerations. During the 45-day period prior to trial, despite repeated requests, petitioners were denied the opportunity to appear personally in court. Although this detention is preceded by a judicial determination that probable cause exists, RCW 71.09.040, the decision is made ex parte and without prior notice to the detainee.

In contrast, under RCW 71.05 (involuntary commitment), an individual is subject first to a 72-hour detention for evaluation and treatment. RCW 71.05.150(1)(b). That statute also requires a psychological evaluation within the first 24 hours of detention. RCW 71.05.210. A probable cause hearing, at which the individual may be present, is then held to determine if an additional 14-day detention is warranted. RCW 71.05.200.

The standard for determining the appropriate level of procedure that is due prior to depriving an individual of his right to life, liberty or property is well established:

> [T]he specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

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the Statute contains adequate release provisions. We decline to decide the matter on the limited information before us.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976). We have said that this is "[t]he appropriate test for reviewing the constitutional adequacy of involuntary commitment procedures". *In re LaBelle*, 107 Wn.2d 196, 221, 728 P.2d 138 (1986) (citing *Dunner v. McLaughlin*, 100 Wn.2d 832, 839, 676 P.2d 444 (1984)); *see also In re Schuoler*, 106 Wn.2d 500, 510, 723 P.2d 1103 (1986); *In re Harris*, 98 Wn.2d 276, 285, 654 P.2d 109 (1982). Thus, the court must balance the extent of the individual's interest against the interests of the State.

In addition, equal protection principles of the Fourteenth Amendment and article 1, section 12 of our constitution require that we examine the protections contained in the Statute in light of protections afforded those who are committed under the involuntary commitment statute. The equal protection clause requires that "persons similarly situated with respect to the legitimate purposes of the laws receive like treatment".[14] *In re Knapp*, 102 Wn.2d 466, 473, 687 P.2d 1145 (1984). To determine if equal protection has been violated, we examine the purpose of the Statute -- incapacitation and treatment of violent offenders.

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[14]Both this court and the United States Supreme Court have repeatedly applied this provision to a comparison of different commitment schemes. Thus, commitment of the mentally retarded has been compared to involuntary civil commitment, *Heller v. Doe*, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993); court-ordered treatment has been compared to the sexual psychopathy statute, *In re Knapp*, 102 Wn.2d 466, 687 P.2d 1145 (1984); commitment for incompetency to stand trial has been compared to civil commitment under RCW 71.05, *In re Patterson*, 90 Wn.2d 144, 579 P.2d 1335 (1978); commitment of the criminally insane has been compared to civil commitment of the mentally ill, *Baxstrom v. Herold*, 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966); commitment in lieu of sentence under the Wisconsin sex crimes law has been compared to commitment for treatment under the mental health act, *Humphrey v. Cady*, 405 U.S. 504, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972); and, commitment for incompetency to stand trial has been compared with all other civil commitments, *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).

It is important to note at the outset that there are good reasons to treat mentally ill people differently than violent sex offenders. *See People v. Pembrock*, 62 Ill. 2d 317, 322, 342 N.E.2d 28 (1976) (A sexually dangerous person "creates different societal problems, and his past conduct is different in degree and kind from the conduct of persons in the larger, more inclusive class defined under the Mental Health Code".). Sexually violent predators are generally considerably more dangerous to others than the mentally ill. Treatment methods are also markedly different for the two populations. *See* RCW 71.09.010. Nevertheless, these distinctions between the two groups must be related to any differences in treatment under the respective statutes. That is, "[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made". *Baxstrom v. Herold*, 383 U.S. 107, 111, 86 S. Ct. 760, 763, 15 L. Ed. 2d 620 (1966). The Supreme Court has said that the dangerousness of the detainee "may be a reasonable distinction for purposes of determining the type of *custodial or medical care* to be given, but it has *no relevance whatever* in the context of the opportunity to show whether a person is mentally ill at *all*". (Some italics ours.) *Baxstrom*, at 111, 86 S. Ct. at 763.

All individuals who are involuntarily committed are entitled to procedural and substantive protections. *Jackson v. Indiana*, 406 U.S. 715, 724, 92 S. Ct. 1845, 1851, 32 L. Ed. 2d 435 (1972). Thus, the Court in *Jackson* held:

> that by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release . . . Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment.

Jackson, 406 U.S. at 730, 92 S. Ct. at 1854. A person cannot be deprived of procedural protections afforded other individuals merely because the State makes the decision to seek commitment under one statute rather than another statute. *Humphrey v. Cady*, 405 U.S. 504, 512, 92 S. Ct. 1048, 1053-54, 31 L. Ed. 2d 394 (1972). Thus, in regard to the initial determination of whether there is probable cause for detention, an individual is entitled to the same opportunity to appear before the court to contest detention in any civil commitment proceeding.

Application of the due process and equal protection principles discussed above requires that detainees under the Statute be afforded an opportunity to appear in person to contest probable cause. Petitioners' liberty interests are substantially infringed during the 45-day period leading up to trial. Absent an opportunity to appear and respond to the petition for commitment, we believe that the risk of wrongful detention is too great.

In contrast, the burden of providing notice and an opportunity for a detainee to appear is not too onerous. The breadth of such a hearing would remain within the discretion of the trial court. Insofar as this hearing is limited to verification of the detainee's identity and the determination of probable cause to believe that he or she is a sexually violent predator, we do not anticipate a lengthy proceeding. Because many of the individuals affected will be imprisoned prior to commitment, *see* RCW 71.09.030, notification of the proceedings is simple.

In *Harris*, we imposed such requirements as a function of "inherent judicial power". *In re Harris*, 98 Wn.2d 276, 287, 654 P.2d 109 (1982). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands". *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972).

On several prior occasions, we have supplemented the commitment procedures of RCW 71.05 to bring that statute into compliance with procedural due process guaranties. *In re Schuoler*, 106 Wn.2d 500, 510, 723 P.2d 1103 (1986); *In re Cross*, 99 Wn.2d 373, 662 P.2d 828 (1983); *In re Harris*, *supra*. In addition, we often interpret statutes in a manner which renders them constitutional. *State v. Browet, Inc.*, 103 Wn.2d 215, 219, 691 P.2d 571 (1984). Here, too, additional procedures are needed to ensure that the Statute is enforced fairly.

Therefore, we hold that a 72-hour hearing is required by the constitutional guaranty to due process, and must be available to detainees under the Statute. While this requirement was not complied with here, it had no bearing on the ultimate outcome of petitioners' trials; thus the omission in this instance does not require reversal.

2. Less Restrictive Alternative.

Petitioners argue that the Statute violates equal protection because it does not require consideration of less restrictive alternatives to confinement. They point to the mental health statute, RCW 71.05, which requires consideration of such alternatives as a precursor to confinement. *See* RCW 71.05.240, .320.

We agree. The State cannot provide different procedural protections for those confined under the sex predator statute unless there is a valid reason for doing so. Here, the State offers no justification for not considering less restrictive alternatives under 71.05, and denying the same under RCW 71.09. Not all sex predators present the same level of danger, nor do they require identical treatment conditions. Similar to those committed under RCW 71.05, it is necessary to account for these differences by considering alternatives to total confinement. We therefore hold that equal protection requires the State to comply with provisions of RCW 71.05 as related to the consideration of less restrictive alternatives.

Less restrictive alternatives were not considered in either Young's or Cunningham's respective trials. Given our resolution in Cunningham's case, we are concerned only with the effect of this holding in regard to Young. We remand Young's case for consideration of alternatives to confinement. Because the sex predator determination has already been made, the finder of fact need only consider if the less restrictive alternatives are appropriate.

3. Jury Verdict and Selection.

Petitioners claim that the Statute provides an inadequate burden of proof by failing to require a unanimous verdict. The Statute is silent on the issue, but we believe that it must be construed to afford an individual the right to a unanimous 12-person verdict.

Our primary goal in interpreting statutes is to carry out the intent of the Legislature. *Anderson v. O'Brien*, 84 Wn.2d 64, 67, 524 P.2d 390 (1974). The sexually violent predator Statute requires the State to prove beyond a reasonable doubt that the person is a sexually violent predator. RCW 71.09.060(1). The Legislature's use of the "beyond a reasonable doubt" standard suggests an acute awareness of the need for heightened procedural protections in these proceedings. Moreover, in Washington, the beyond a reasonable doubt standard generally requires a unanimous verdict. *See State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Considering the context normally associated with this high burden of proof, *State v. Elgin*, 118 Wn.2d 551, 556, 825 P.2d 314 (1992), we find that the Legislature included the need for a unanimous verdict when it required "proof beyond a reasonable doubt" in the statutory scheme.

Here, over defense objections, the jury in Cunningham's trial was not instructed that unanimity was required, and an 11-to-1 verdict was returned -- at least one person on the jury felt that the State failed to meet its burden. Under the standards announced here, the verdict was

insufficient. In Young's case, the verdict was unanimous, and the jury's finding is affirmed.

Petitioners also contend that they are entitled to 12 peremptory challenges at trial. Young requested the additional challenges at a pretrial hearing. The trial court refused, and apparently gave three challenges to each side, plus an additional challenge to be used for the alternate seat. Cunningham also requested additional challenges. The trial court granted six challenges per side plus one for each alternate. Neither petitioner claims that he was prejudiced by the allegedly insufficient number of challenges; indeed, neither petitioner even submits the record of voir dire.

Petitioners argue that because the Statute subjects them to indefinite incarceration, they should be afforded the same number of peremptory challenges as defendants in capital cases under CrR 6.4. We disagree. The proceedings here are civil, not criminal, in nature. Thus, the appropriate number of challenges is found in RCW 4.44.130, which deals with civil juries: "Each party shall be entitled to three peremptory challenges". *See also* 14 Lewis H. Orland & Karl B. Tegland, Wash. Prac., *Trial Practice Civil* § 206, at 334 (4th ed. 1986). This is the same number of peremptory challenges allowed in RCW 71.05 civil commitment proceedings. *See* MPR 3.4(a). Therefore, three peremptory challenges are sufficient.

4. Vagueness.

Petitioners and amicus American Civil Liberties Union argue that various terms in the Statute -- such as "comparable", "sexually motivated", "safe to be at large", "mental abnormality", and "likely" -- are unconstitutionally vague.

> The issue of vagueness involves the procedural due process requirements of fair notice of the conduct warranting detention and clear standards to prevent arbitrary enforcement by those charged with administering the applicable statutes.

In re LaBelle, 107 Wn.2d 196, 201, 728 P.2d 138 (1986) (citing *Hontz v. State*, 105 Wn.2d 302, 308, 714 P.2d 1176 (1986); *see also Clyde Hill v. Roisen*, 111 Wn.2d 912, 916, 767 P.2d 1375 (1989). Exact specificity is not required; rather, the language used must be susceptible to understanding by persons of ordinary intelligence. *Seattle v. Eze*, 111 Wn.2d 22, 26-27, 759 P.2d 366, 78 A.L.R.4th 1115 (1988). We do not find the Statute to be so vague as to deny due process.

Ample standards are present to guide the exercise of discretion and to provide notice to potential detainees of prohibited conduct. The Statute is quite specific and explicit. It requires that a person "who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence", RCW 71.09.020(1), as determined at a jury trial if so requested, RCW 71.09.050, be committed to the custody of DSHS for care and treatment. RCW 71.09.060. The definitional section sets out precise standards, and defines "mental abnormality". RCW 71.09.020(2). As the record indicates, the experts who testified at the commitment trials adequately explained and gave meaning to this term within a psychological context. *E.g.*, CPY, (Feb. 2, 1991), at 159-60; CPC (May 5, 1991), at 54-65. Likewise, the term "personality disorder" has a well accepted psychological meaning. *See DSM-III-R* at 335-58. The application of these standards to a particular set of facts is, of course, a determination for the factfinder, but the definitions provide sufficient guidance to do so properly.

Similar challenges based on vagueness have been rejected. The United States Supreme Court, in analyzing a sexual psychopath statute, held that the statute was not vague because it could be applied only to a narrowly defined group of offenders. *Minnesota ex rel. Pearson v. Probate Court*,

309 U.S. 270, 274-75, 60 S. Ct. 523, 525-26, 126 A.L.R. 530 (1940). The statute there turned on "underlying conditions, calling for evidence of past conduct pointing to probable consequences . . . as susceptible of proof as many of the criteria constantly applied in prosecutions for crime." *Pearson*, at 274, 60 S. Ct. at 526. Similarly, our Statute calls for particular evidence of past conduct and a propensity toward violence. *See also People v. Pembrock*, 62 Ill. 2d 317, 342 N.E.2d 28 (1976). The sex predator Statute is not so vague that it denies due process.

5. Right to Remain Silent.

Petitioners argue that they were denied their right to remain silent. Both were ordered by the trial court to speak to the State's psychologists. In addition, testimony was allowed at trial that Young refused to abide by the court's order. First, petitioners claim that the Fifth Amendment privilege against self-incrimination should apply to them. Second, they argue that because persons committed under the involuntary commitment act, RCW 71.05, have a right to remain silent, application of equal protection to the Statute compels this court to find that sexually violent predators possess that same right.

Under the Fifth Amendment, no person "shall be compelled in any criminal case to be a witness against himself". The Supreme Court has not entirely limited application of the Fifth Amendment privilege to criminal cases. *See, e.g., Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). However, the Court has refused to apply the privilege to civil cases unless it has been shown conclusively that the penalty imposed is punishment tantamount to a criminal sanction. *United States v. Ward*, 448 U.S. 242, 254, 100 S. Ct. 2636, 2644, 65 L. Ed. 2d 742 (1980). More to the point, in assessing the Illinois statute, found above to be significantly similar to RCW 71.09, the Supreme Court held that the Fifth Amendment does not apply. *Allen v. Illinois*, 478 U.S. 364, 375, 106 S. Ct. 2988,

2995, 92 L. Ed. 2d 296 (1986). Where, as here, "the State serves its purpose of *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment", the action is not a "criminal case" for purposes of the privilege against compulsory self-incrimination. *Allen*, at 373-74, 106 S. Ct. at 2994.[15]

Furthermore, we see good reasons to refuse the statutory right to remain silent to sexually violent predators even though the Legislature has granted such a right to the mentally ill. Equal protection requires that similarly situated persons be treated alike. *In re Knapp*, 102 Wn.2d 466, 473, 687 P.2d 1145 (1984). However, sexually violent predators are not similarly situated to the mentally ill in regard to the treatment methods employed, or the information necessary to ensure that they receive proper diagnosis and treatment. The Legislature made specific findings which are pertinent to this distinction:

> [A] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW . . .. [S]exually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. . . . The legislature further finds that the prognosis for curing sexually violent offenders is poor, . . . and the treatment modalities for this population are very

[15]Of course, detainees could not be compelled to incriminate themselves by answering questions about prior uncharged or unconvicted criminal behavior. *See State v. Post*, 118 Wn.2d 596, 610-11, 826 P.2d 172, 837 P.2d 599 (1992).

> different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act.

RCW 71.09.010. The problems associated with the treatment of sex offenders are well documented, and have continued to confound mental health professionals and legislators. The mental abnormalities or personality disorders involved with predatory behavior may not be immediately apparent. Thus, their cooperation with the diagnosis and treatment procedures is essential.[16] *See also Heller*, 509 U.S. at 325, 113 S. Ct. at 2645 ("the different treatment to which a committed individual is subjected provides a rational basis."); *Bailey v. Gardebring*, 940 F.2d 1150, 1153 (8th Cir. 1991) (no constitutional right is violated when persons who suffer from severe mental disorders are treated differently from persons with less serious disorders), *cert. denied*, 503 U.S. 952, 112 S. Ct. 1516, 117 L. Ed. 2d 652 (1992); *People v. Parrott*, 244 Ill. App. 3d 424, 184 Ill. Dec. 278, 283, 613 N.E.2d 305, 310 (1993) (When individual is committed using "beyond a reasonable doubt" standard, "he was not more harshly treated than other persons whose commitment rests upon a finding of mental illness by clear and convincing evidence".).

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[16]Our rejection of petitioners' claim to a right to remain silent resolves several additional issues. First, petitioners claim that expert opinion testimony was based on statements obtained in violation of petitioners' right to remain silent. Second, petitioners assert that they have the unequivocal right to testify without notifying the State in advance. Because these proceedings are civil in nature, and because petitioners have no absolute right to remain silent, these contentions are without merit. Moreover, since we reverse the verdict against Cunningham, we need not consider the State's argument made on cross appeal, that the admission of his testimony despite discovery violations was in error.

V

EVIDENTIARY ISSUES

1. Prior Crimes.

Petitioners contend that several of the State's witnesses should not have been allowed to testify, and that other testimony was admitted in error. They claim that all the testimony of the victims of their prior crimes should have been excluded, as it was irrelevant and unfairly prejudicial. In addition, they argue that the victims' testimony pertaining to their emotional state at the time of the crimes should have been excluded as unfairly prejudicial. Cunningham argues separately that evidence relating to his juvenile conviction should have been excluded. Young claims that testimony about his 1972 bomb threat conviction was inadmissible.

Generally, all relevant evidence is admissible and all irrelevant evidence is inadmissible. ER 402. Relevant evidence is any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence". ER 401. Even relevant evidence will be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice". ER 403. The determination of relevance is within the broad discretion of the trial court, and will not be disturbed absent manifest abuse of that discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991).

The evidence here was properly admitted. The manner in which the previous crimes were committed has some bearing on the motivations and mental states of the petitioners, and is pertinent to the ultimate question here. Moreover, the likelihood of continued violence on the part of petitioners is central to the determination of whether they are sexually violent predators under the terms of the Statute. Thus, we cannot say that the trial court abused its discretion

in admitting the victims' testimony. Although we agree that the testimony presented by the victims was compelling, and, therefore, had a substantial effect on the jury, we do not believe that its prejudicial effect outweighed its probative value. In assessing whether an individual is a sexually violent predator, prior sexual history is highly probative of his or her propensity for future violence.

In a similar vein, the trial court acted within its discretion when it admitted evidence of Cunningham's sexually motivated juvenile conviction. A person's history of sexually violent offenses is relevant to the sex predator determination. RCW 71.09.020(1). By using the word "offense", the Legislature indicated an intent to include prior juvenile adjudications within the scope of permissible proof at sex predator proceedings. *See In re A, B, C, D, E*, 121 Wn.2d 80, 87, 847 P.2d 455 (1993).

We do not, however, perceive any relevance to the testimony presented about Young's 1972 conviction for a bomb threat. The threat was made on a college campus where Young was a student. No sexual motivation was alleged for this crime. On the other hand, it is hard to conceive of any juror attaching much significance to the conviction in light of Young's prior history of violent sex offenses, which includes at least six felony rapes. The jury instructions make it clear that only sex offenses or sexually motivated felonies are considered in making the sex predator determination. Any error was harmless.

2. Validity of Prior Convictions.

Young contends that all evidence relating to his conviction in 1963 for four rapes should have been excluded because the jury instructions given there were in error. We disagree. The trial court properly held that the convictions were admissible.[17]

[17]Although a habeas corpus petition is currently being considered on its merits, the judgment and sentence are facially valid, *see*

We have previously held that the State may use prior convictions without proving their constitutional validity in appropriate circumstances. *State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986). Because an individual subject to civil commitment would have no greater constitutional protections in this regard, we apply the *Ammons* case by analogy. In sentencing proceedings, the court has established the following rule:

> [A] prior conviction which has been previously determined to have been unconstitutionally obtained or which is constitutionally invalid on its face may not be considered. Constitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude.

(Citations omitted.) *Ammons*, at 187-88, 713 P.2d 719. To hold otherwise would require appellate review of all prior convictions, which would "unduly and unjustifiably overburden the [trial] court". *Ammons*, at 188, 713 P.2d 719.

Finally, Young contends that the testimony of interrogating officers concerning his confessions to the rapes was wrongly admitted. He argues that because tape recordings were made (but not offered into evidence) the testimony must be excluded. Furthermore, he asserts that he should have been permitted to offer impeachment evidence of a criminal trespass charge and disciplinary history against the officers. These arguments are patently meritless.

ER 803(a)(22), and have been affirmed on appeal. *State v. Young*, 65 Wn.2d 938, 400 P.2d 374, *cert. denied*, 382 U.S. 963, 86 S. Ct. 446, 15 L. Ed. 2d 365 (1965).

3. Expert Testimony.

Petitioners argue that the testimony of the State's expert witnesses, Dr. Dreiblatt and Dr. Rawlings, should have been excluded because they testified as to theories which are not generally accepted in the scientific community. They contend that the experts had no basis for their testimony that any particular mental abnormality or personality disorder exists which makes a person likely to rape, or that Young or Cunningham was in fact likely to re-offend. They are supported in this claim by amicus, the Washington State Psychiatric Association. We conclude that the testimony was properly admitted.

Petitioners point to testimony offered by their own experts that rape is not necessarily caused by mental illness or disease. At trial, the jury heard a broad spectrum of evidence pertaining to the petitioners' condition. In addition to the State's expert testimony presenting the diagnoses of petitioners, the jury heard testimony from experts presenting the contrary view. From this evidence relating both to the accuracy of the diagnosis in general, and the specific criticism of the diagnoses made in Young's and Cunningham's cases, the jury was able to return a verdict that petitioners were sexually violent predators.

Initially, we must determine "if the evidence in question has a valid, scientific basis". *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993). The standard for determining if evidence based on novel scientific procedures is admissible is that set forth in *Frye v. United States*, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C. Cir. 1923) (rejecting precursor to the modern polygraph test). The rule is well established:

> [E]vidence deriving from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community.

State v. Martin, 101 Wn.2d 713, 719, 684 P.2d 651 (1984) (rejecting hypnotically induced testimony). Under *Frye*, "[t]he core concern . . . is only whether the evidence being offered is based on established scientific methodology". *Cauthron*, at 889, 846 P.2d 502.

We have previously held that predictions of future dangerousness do not violate due process, despite the inherent uncertainties of psychiatric predictions. *In re Harris*, 98 Wn.2d 276, 280, 654 P.2d 109 (1982). Our reasoning there is convincing in this context as well:

> Petitioner's argument would eviscerate the entire law of involuntary commitment as well as render dubious the numerous other areas where psychiatry and the law intersect. There is no question the prediction of dangerousness has its attendant problems. . . .
>
> . . . But we are not prepared to abandon the possibility of conforming the law of involuntary civil commitment to the requirements of the constitution.

Harris, at 280-81, 654 P.2d 109. In addition, we have held that a finding of future dangerousness provides an appropriate reason to impose an exceptional sentence on a sex offender. *State v. Pryor*, 115 Wn.2d 445, 454, 799 P.2d 244 (1990). Our holding in Pryor implies that predictions of future dangerousness are sufficiently accurate and reliable. We see no reason to reconsider that holding here. *See State v. Janes*, 121 Wn.2d 220, .235, 850 P.2d 495 (1993) (independent Frye determination unnecessary when an analogous proposition has already been deemed admissible).

We are also not persuaded that the trial court erred in allowing the remainder of the experts' testimony. The sciences of psychology and psychiatry are not novel; they have been an integral part of the American legal system since its inception. Although testimony relating to mental illnesses

and disorders is not amenable to the types of precise and verifiable cause and effect relation petitioners seek, the level of acceptance is sufficient to merit consideration at trial. As Justice White pointed out in *Foucha*, "such opinion is reliable enough to permit the courts to base civil commitments on clear and convincing medical evidence that a person is mentally ill and dangerous". 504 U.S. at 76 n.3, 112 S. Ct. at 1783 n.3.

Our position is supported by the Legislature's determination, following numerous hearings, that the sexually violent predator condition is not only recognized, but treatable and capable of diagnosis. *See* RCW 71.09. As Justice O'Connor pointed out in *Foucha v. Louisiana*, 504 U.S. 71, 87, 112 S. Ct. 1780, 1789, 118 L. Ed. 2d 437 (1992), the inherent uncertainty involved in making psychological judgments requires courts to "'. . . pay particular deference to reasonable legislative judgments' about the relationship between dangerous behavior and mental illness." (O'Connor, J., concurring) (quoting *Jones v. United States*, 463 U.S. 354, 365 n.13, 103 S. Ct. 3043, 3050 n.13, 77 L. Ed. 2d 694 (1983)).

Next, we must determine if expert testimony was properly admitted. ER 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The determination of whether expert testimony is admissible is within the discretion of the trial court. *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992). Unless there has been an abuse of discretion, this court will not disturb the trial court's decision.

The 2-part test we apply for ER 702 matters is whether: "(1) the witness qualifies as an expert and (2) the expert testimony would be helpful to the trier of fact." *Cauthron*, 120 Wn.2d at 890, 846 P.2d 502. Here, there is no dispute as to either of the State's experts' qualifications. Moreover, the expert testimony was certainly helpful to the trier of fact -- psychiatric testimony is central to the ultimate question here: whether petitioners suffer from a mental abnormality or personality disorder.

In a related argument, Young claims that Dr. Dreiblatt's testimony that Young suffers from a *combination* of mental abnormality and personality disorder was insufficient to meet the definition of sexually violent predator. We disagree. The definition is phrased in the alternative and states that a sexually violent predator is someone who suffers from a mental abnormality or a personality disorder. RCW 71.09.020(1). We must construe it, however, in a manner which effectuates its purpose. *Wichert v. Cardwell*, 117 Wn.2d 148, 151, 812 P.2d 858 (1991). The Legislature intended that all dangerous sex offenders be incapacitated and treated. Frequently, as Young's case amply demonstrates, an individual will suffer from multiple mental abnormalities and personality disorders which make violent rape likely. It would thwart the legislative purpose if the Statute only allowed the commitment of those who suffer from one or the other, while prohibiting the commitment of more seriously afflicted sexually violent predators. Thus, the showing that Young suffers both a mental abnormality *and* a personality disorder meets the requirements of the Statute.

Petitioners also claim that the expert testimony should be excluded because it was based on hearsay. Under ER 703, an expert's opinion may be heard on materials "of a type reasonably relied upon by experts in the particular field". Both experts for the State here relied on psychological reports and criminal history of petitioners. They testified that

these are the types of materials reasonably relied on to diagnose future dangerousness of sex offenders. Indeed, in the face of petitioners' refusals to cooperate, no other course was open to the State's experts.

Finally, it must be pointed out that petitioners each presented expert testimony of their own. The juries were urged by defense experts to reject the opinions of the State's experts, and had ample opportunity to weigh the testimony of both sides. The ultimate decision of whether or not petitioners were sexually violent predators was made by the factfinder only after a thorough presentation of the experts' views.

VI

CONCLUSION

In sum, we conclude that the overall statutory scheme presented in the sexually violent predator portions of the Act is constitutional. We hold that RCW 71.09 is civil rather than criminal, and does not violate either the prohibition against ex post facto laws or the double jeopardy clause. We further hold, after a searching inquiry, that the basic statutory scheme implicates no substantive due process concerns. Although we conclude that a detainee must be permitted to appear in court within 72 hours to contest probable cause, the failure to accord petitioners this right was harmless error.

We conclude that the Statute is not void for vagueness; the terms are sufficiently specific and explicit. Further, due process does not operate to guarantee petitioners a right to remain silent; there are ample reasons to treat these detainees differently than others involuntarily committed. As to the remaining evidentiary issues, in most instances the trial courts acted properly within their discretion. The testimony of the victims of previous sexual crimes, including any juvenile offenses, is relevant and may be admitted. The expert testimony was also properly admitted. We hold that the evidence pertaining to a bomb threat conviction in

Young's case was inadmissible, but that error was harmless. Finally, we have given ample consideration to all of the remaining arguments raised in the personal restraint petitions and on appeal, as well as those advanced by amici, and conclude that they lack merit.

Turning to the specific disposition in petitioners' cases, we reverse Cunningham's commitment due to the State's failure to prove dangerousness through evidence of a recent overt act. Also, the commitment was in error because the jury was not unanimous. We affirm the sex predator determination in petitioner Young's case, but remand solely for a consideration of less restrictive alternatives.

ANDERSEN, C.J., and BRACHTENBACH, DOLLIVER, GUY, and MADSEN, JJ., concur.

JOHNSON, J. (dissenting) -- I dissent.

> [I]ncarceration of persons is . . . one of the most feared instruments of state oppression and . . . freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments . . ..[18]

The sexually violent predator statute, RCW 71.09 (hereinafter Statute), is a well-intentioned attempt by the Legislature to keep sex predators off the streets. However, by authorizing the indefinite confinement in mental facilities of persons who are not mentally ill, the Statute threatens not only the liberty of certain sex offenders, but the liberty of us all. By committing individuals based solely on perceived dangerousness, the Statute in effect sets up an Orwellian "dangerousness court", a technique of social control fundamentally incompatible with our system of ordered liberty guaranteed by the constitution and contrary to the

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[18] *Foucha v. Louisiana*, 504 U.S. 71, 90, 112 S. Ct. 1780, 1791, 118 L. Ed. 2d 437 (1992) (Kennedy, J., dissenting).

recent United States Supreme Court decision in *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992).

History has proven the grave error in creating special classes of individuals for whom constitutional rights are diminished. Today the majority condones the Legislature's creation of such a special class, trampling these individuals' rights. I cannot agree. The Statute is nothing more or less than a preventive detention scheme based on allegations of future dangerousness. Once a person has committed a sexually motivated crime, no matter how remote in time or place, the State is authorized to hold that person forever for the "good of the community". Our community would be better served by steadfast adherence to constitutional principles.

The majority concedes the unconstitutionality of the Statute and attempts to salvage it by reading in requirements not included by the Legislature. Unfortunately, the majority's pen stops short. Under *Foucha*, the State must prove an individual is *both* mentally ill and dangerous before the person can be involuntarily committed; however, the Statute still fails to meet the mental illness requirement. Thus, the Statute offends the due process clause by subjecting individuals to lifetime confinement based not on any crime committed, but instead on fears of future crimes, and it offends the prohibitions against ex post facto laws and double jeopardy by masquerading as a civil commitment law when its purpose is penal.

I

SUBSTANTIVE DUE PROCESS

The sexual predator Statute violates substantive due process. Under the Fifth and Fourteenth Amendments, no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. 5; U.S. Const. amend. 14, § 1. "[T]he Due Process Clause contains a

substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 664-65, 88 L. Ed. 2d 662, 106 S. Ct. 677, 88 L. Ed. 2d 662 (1986)). The test to be applied in determining the constitutionality of a statute under substantive due process depends upon whether a fundamental right is at stake.

An individual's liberty interest is fundamental in nature. *See United States v. Salerno*, 481 U.S. 739, 750, 107 S. Ct. 2095, 2103, 95 L. Ed. 2d 697 (1987). "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action". *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 437 (1992); *Reno v. Flores*, 507 U.S. 292, 315, 113 S. Ct. 1439, 1454, 123 L. Ed. 2d 1 (1993) (O'Connor, J., concurring). Physical confinement in a mental institution entails a "massive curtailment of liberty". *Vitek v. Jones*, 445 U.S. 480, 491-92, 100 S. Ct. 1254, 1262-63, 63 L. Ed. 2d 552 (1980).

When a statute implicates a fundamental right such as a person's liberty, the test for whether the statute passes constitutional muster is one of strict scrutiny. For the statute to be constitutional, it must further a compelling state interest and must be narrowly tailored to achieve that interest. *State v. Farmer*, 116 Wn.2d 414, 429, 805 P.2d 200, 812 P.2d 858, 13 A.L.R.5th 1070 (1991); *In re Schuoler*, 106 Wn.2d 500, 508, 723 P.2d 1103 (1986).

Although the majority acknowledges the Statute must pass strict scrutiny, it fails to adequately analyze whether the Statute is narrowly tailored to achieve the State's interest. The most recent statement of the Supreme Court's requirements for narrowly tailoring an involuntary commitment statute is *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). The majority has

failed to see or has chosen to ignore that *Foucha* provides a framework for substantive due process analysis in these types of cases. *Foucha* recognizes only three situations in which the State has such a compelling interest in public safety that a complete deprivation of an individual's liberty interest is justified: criminal conviction, civil commitment, and limited detention of persons shown to be dangerous to the community. *Foucha*, 504 U.S. at 80, 112 S. Ct. at 1785-86.

Even in these three situations, however, the State is required to narrowly tailor its statutes. For example, the requirement that a person be both mentally ill and dangerous is a way to constitutionally tailor civil commitment statutes. In addition, strict time limits for pretrial detention are another specific way to narrow the conditions under which an individual may be confined.

In contrast, the sexual predator Statute is not narrowly tailored to achieve its compelling interest. In order to be narrowly drawn, the Statute must satisfy certain requirements set out by the United States Supreme Court for either civil commitment or preventive detention statutes. The sex predator Statute fails on both counts.

Under civil commitment, substantive due process requires that an individual be both mentally ill and dangerous before he or she may be involuntarily committed. *Foucha*, 504 U.S. at 77, 112 S. Ct. at 1784. In *Foucha*, an insanity acquittee who had regained his sanity sought release from a mental institution. Foucha was found to be no longer mentally ill, but still dangerous to others because of his "antisocial personality, a condition that is not a mental disease and . . . is untreatable". *Foucha*, 504 U.S. at 75, 112 S. Ct. at 1782. The Court held that Foucha's continued confinement based on dangerousness alone violated due process. *Foucha*, 504 U.S. at 77, 112 S. Ct. at 1784.

Like the statute in *Foucha*, RCW 71.09 violates substantive due process because it requires only dangerousness and not mental illness as a prerequisite to

commitment. The Statute, by its own terms, applies specifically to individuals who "do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act". RCW 71.09.010.

The Statute provides for the indefinite commitment of any person deemed to be a "sexually violent predator", but the Statute's definition of this term does not apply to a group of individuals who are mentally ill in any medically recognized sense. *See* La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. Puget Sound L. Rev. 655, 691-92 (1991-1992); Comment, *Sexual Violence, Sanity & Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders*, 15 U. Puget Sound L. Rev. 879, 898-900 (1991-1992).

The Statute defines "sexually violent predator" as any person who meets the following two criteria: (1) the person must at any time in his or her life been either charged with or convicted of a sexually violent crime; and (2) the person must suffer from "a *mental abnormality* or *personality disorder* which makes the person likely to engage in predatory acts of sexual violence". (Italics mine.) RCW 71.09.020(1). The second criterion involves a prediction of dangerousness based on a "mental abnormality" or "personality disorder", but these two terms do not involve any medically recognized mental illness.

Amicus, the Washington State Psychiatric Association, points out the term "mental abnormality" has no clinically significant meaning and no recognized diagnostic use; the term "abnormality" has long been in disuse because it can have a variety of different meanings. The Statute defines the term "mental abnormality" as:

> a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting

such person a menace to the health and safety of others.

RCW 71.09.020(2). A "mental abnormality" which makes a person "likely to engage in predatory acts of sexual violence" is thus defined by the Statute as a mental condition that may predispose a person to commit a sex crime. RCW 71.09.020(1), (2). This definition is merely circular, and, as one commentator has observed, allows a "mental abnormality" to be established in a circular manner: the "abnormality" will be derived from the person's past sexual behavior, and this in turn will be used to establish the person's predisposition to future dangerous sexual behavior. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. Puget Sound L. Rev. 597, 602, 633 (1991-1992) (concluding the Statute's definition of "sexually violent predator" fails to coincide with clinical or empirical knowledge regarding sex offenders). *See also* Rideout, *So What's in a Name? A Rhetorical Reading of Washington's Sexually Violent Predators Act*, 15 U. Puget Sound L. Rev. 781, 793 (1991-1992) (discussing the tautology "in the statement that sexually violent predators have features that lead to sexually violent behavior").

The Statute also does not provide a definition for the term "personality disorder". Amicus points out this term has a clinically recognized meaning, but there is no "personality disorder" specific to sex offenders. Because of this problem, the task of determining whether a causal relationship exists between a "personality disorder" and the person's potential dangerousness is nothing more than "a matter of speculation or meaningless circularity". Wettstein, 15 U. Puget Sound L. Rev. at 603; *see also* Comment, *Washington's Sexually Violent Predator Law: The Need To Bar Unreliable Psychiatric Predictions of Dangerousness From Civil*

Commitment Proceedings, 39 U.C.L.A. L. Rev. 213 (1991-1992).[19]

Despite some psychiatric incantations, therefore, the sexual predator Statute deals with potentially dangerous people, but not mentally ill people. Because under *Foucha* a prediction of dangerousness alone is an unconstitutional basis for indefinite confinement in a mental institution, the Statute violates due process.

Even if a personality disorder or mental abnormality is a mental illness, this court has previously required proof of a recent overt act as evidence of dangerousness before a person can be detained to assess whether he or she is mentally ill. *See In re Harris*, 98 Wn.2d 276, 654 P.2d 109 (1982). The plain language of the sex predator Statute contains no such requirement.[20] The majority attempts to salvage the Statute's constitutionality by reading in a requirement of a recent overt act, but only for individuals who have been released into the community. For individuals currently incarcerated, no evidence of a recent overt act is required.

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[19]The majority chides the dissent for relying on a handful of law review articles in support for the claim that a "mental abnormality" or "personality disorder" does not constitute "mental illness" as required by *Foucha*. Majority, at 33 n.10. It is curious that the majority also relies on a law review article in support of its proposition that the Statute's terms do constitute "a number of recognized mental pathologies", *i.e.*, mental illness. See majority, at 27. It is also curious that, after concluding the statute requires a showing of mental illness, the majority states in its equal protection analysis, "there are good reasons to treat *mentally ill people* differently than *violent sex offenders*". (Italics mine.) Majority, at 44. The majority cannot have it both ways.

[20]To commit a person under the Statute, the State is required to reprove the defendant committed a prior crime and to present an evaluation by a psychologist establishing the person is likely to reoffend. However, this "evaluation" is often based merely on a review of the police reports and prior psychological evaluations rather than on a personal interview with the defendant.

This judicial rewriting of the Statute is unprincipled decisionmaking at its worst. Although the majority is correct that a court must construe a statute to render it constitutional, majority at 46, *a court cannot rewrite a statute by reading into it language that simply is not there. Addleman v. Board of Prison Terms & Paroles*, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986) (stating a court may not "read into a statute those things which it conceives the Legislature may have left out unintentionally"); *In re Taylor*, 105 Wn.2d 67, 69, 711 P.2d 345 (1985) (stating if language of a statute is clear, a court may not "read things into it which are not there"). Such judicial rewriting is not only unprincipled, but also unfair. The parties could not have anticipated this new construction and have not had an opportunity to brief or argue the constitutionality of the majority's new version of the Statute.

The court's wholesale reading in of an overt act requirement also runs counter to the Legislature's intent. The Statute was enacted in response to intense public outcry over two brutal sex crimes: the rape and mutilation of a Tacoma boy, and the rape and murder of a Seattle woman. *See* Boerner, *Confronting Violence: In the Act & in the Word*, 15 U. Puget Sound L. Rev. 525 (1991-1992). The individuals who committed the crimes had recently been released after serving time for previous sex crimes. To the extent that the majority now requires evidence of a recent overt act by such released individuals, the majority paves the way for a repeat of the above brutal crimes, which is exactly what the legislation was enacted to avoid! This is an absurd result.

Finally, the majority's rewriting of the Statute raises new equal protection concerns. By reading in this new requirement, the court creates two classes of persons under the same statute: those incarcerated versus those who are not. This is a distinction without a difference. Immediately upon release, an individual must now commit an overt act to be incarcerated under the Statute, whereas the day before

release, the same individual could be committed without proof of an overt act. This new distinction is arbitrary, violating even a rational basis review.

Equal protection requires that "persons similarly situated with respect to the legitimate purposes of the laws receive like treatment". *In re Knapp*, 102 Wn.2d 466, 473, 687 P.2d 1145 (1984). The purpose of the Statute is to prevent sexual predators from reoffending and thereby protect the community. It is difficult to see the difference between an individual the day before he or she leaves prison versus an individual the day after departing from jail. The only rationale offered by the majority is that an incarcerated individual does not have the opportunity to commit a recent overt act. I disagree. Evidence amounting to a "recent overt act" is often present even while in jail. Such evidence could be based on prison activities or conduct, such as inappropriate drawings of sexual encounters with children.

The court cannot choose to have two standards for commitment: one for those presently incarcerated and another for everybody else.[21] The United States Supreme Court has been careful to harmonize the constitutional requirements for *civil* commitment in the ordinary situation with those arising when there has been a finding of insanity at a *criminal* trial. *See Jones v. United States*, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983). Although the majority's requirement of a recent overt act by released individuals harmonizes RCW 71.09 with the State's short-term detention statute, RCW 71.05,[22] this requirement

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[21]The majority implies that *Heller v. Doe*, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) authorizes a 2-tier civil commitment process. Majority, at 67 n.14. *Heller* is inapt, however, for two reasons: first, the Court did not review the Statute under a heightened scrutiny standard, and second, it deals with mentally retarded, not mentally ill, persons.

[22]The majority also reads into RCW 71.09 a requirement from RCW 71.05, which requires the State to consider less restrictive alternatives as a precursor to confinement. Majority, at 47. Although

does not render the Statute constitutional. Under the majority's interpretation, incarcerated individuals still face the potential for lifetime detention based only on the possibility of future dangerousness. Because incarceration under the Statute can follow a long prison term and because the majority does not require a recent overt act for these individuals, the determination that they are "dangerous" is not even based on the same standard used for others who are

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perhaps a good idea, the majority's rewriting of the Statute is still inappropriate for the same reasons discussed above. By reading in these new requirements, the court transforms RCW 71.09 into a statute that looks more like RCW 71.05, and thereby frustrates the Legislature's manifest intent to create a *new* statutory scheme since RCW 71.05 was deemed to be inadequate. *See* RCW 71.09.010.

Moreover, the majority's treatment of the equal protection question is inconsistent with its treatment of due process. In explaining why the incarceration of sexual predators within correctional institutions comports with due process, the majority implies that no less restrictive alternatives would effectively address the problem of preventing sex offenders from committing further crimes. The majority states:

> Given the nature of sexually violent predators, it would not be safe to house them in a less secure setting. . . .
>
> . . . .
>
> . . . Here, the dangerousness of committed sex predators justifies a secure confinement facility.

Majority, at 34-35. Yet with respect to equal protection, the majority concludes that the State has proffered no "valid reason" for treating sexually violent predators differently from persons committed under RCW 71.05. Majority, at 47.

It is also incorrect to aver that the State has put forth no justification for the disparate treatment of sexually violent predators under RCW 71.09. In this regard, the majority again flaunts the express intent of the Legislature, which found that:

> [T]he treatment modalities for [sexually violent predators] are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act.

RCW 71.09.010.

civilly committed. If an individual once committed a sex crime and someone thinks that individual is still dangerous, the Statute authorizes a lifetime term in a mental facility. This is pure preventive detention.

The United States Supreme Court has permitted preventive detention only in the pretrial context and only if the duration of confinement is *strictly limited*, not indefinite as in this case. *See, e.g., United States v. Salerno*, 481 U.S. 739, 747-51, 107 S. Ct. 2095, 2101-04, 95 L. Ed. 2d 697 (1987); *Schall v. Martin*, 467 U.S. 253, 264-71, 104 S. Ct. 2403, 2409-14, 81 L. Ed. 2d 207 (1984); *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S. Ct. 1845, 1858, 32 L. Ed. 2d 435 (1972).

In *Salerno*, the Supreme Court upheld a federal act authorizing pretrial detention of defendants deemed dangerous. The Court noted that preventive detention under the act was "limited by the stringent time limitations of the Speedy Trial Act". *Salerno*, 481 U.S. at 747, 107 S. Ct. at 2101-02. In *Schall*, the Court upheld a state statute authorizing the preventive pretrial detention of juveniles accused of crimes who were deemed dangerous, and the Court noted the maximum possible detention under the act was only 17 days. *Schall*, 467 U.S. at 269-70, 104 S. Ct. at 2412-13. Finally, in *Jackson*, the Court held that a criminal defendant who was incapable of proceeding to trial could be detained only for the reasonable period of time necessary to determine whether a substantial probability existed the defendant would ever become capable to proceed to trial. *Jackson*, 406 U.S. at 738, 92 S. Ct. at 1858. Under this standard, the Court in *Jackson* found the defendant's 3 ½ year confinement excessive because the defendant, a deaf mute, was not expected to ever gain the competency to stand trial.

The Supreme Court has never upheld a lifetime preventive detention scheme for those who are feared dangerous. It was asked to do precisely that in *Foucha*. The

State of Louisiana argued that *Salerno* authorized preventive detention for persons who pose a danger to the community. *Foucha*, 504 U.S. at 80, 112 S. Ct. at 1786. The Court disagreed and distinguished *Salerno* on three grounds. First, the Court noted the statute at issue in *Salerno* was narrowly focused on the most serious of crimes and required a finding that no conditions of release could reasonably assure the safety of the community. *Foucha*, 504 U.S. at 81, 112 S. Ct. at 1786. Second, the Court contrasted the time limits for pretrial detention with the indefinite commitment authorized by the Louisiana law. *Foucha*, 504 U.S. at 81-83, 112 S. Ct. at 1786-87. Finally, the Court pointed out that less restrictive alternatives were available to deal with persistent criminal behavior, including enhanced sentences for recidivists. *Foucha*, 504 U.S. at 82, 112 S. Ct. at 1786-87.

Like the statute in *Foucha*, the sexual predator Statute is fundamentally flawed. Its scope is broad, covering everything from murder-rape to attempted sexually motivated burglary. Its duration is indefinite. Unlike *Salerno*, *Schall*, and *Jackson*, the Statute in this case produces lifetime preventive detention. The Legislature found that "sexually violent predators" are "unamenable to existing mental illness treatment modalities" and that the prognosis for curing them is "poor". RCW 71.09.010. The Statute thus creates a class of persons who, by definition, are not likely to be "cured", and thus not likely to ever be released.

As a result, the Statute does precisely what *Foucha* expressly says the government may not do: confine someone indefinitely as dangerous who is not mentally ill but simply has a personality disorder or antisocial personality. As the Supreme Court noted:

> [T]he State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term.

(Italics mine.) *Foucha*, 504 U.S. at 82-83, 112 S. Ct. at 1787. The Legislature has other options for dealing with sex offenders. Enhanced sentences for repeat offenders and supervised release are but two of the most obvious.

The sexual predator Statute has each of the constitutional weaknesses of the statute in *Foucha*, weaknesses that caused the Supreme Court to consider the *Foucha* statute

> *only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions . . . incarcerates only those who are proved beyond a reasonable doubt to have violated a criminal law.*

(Italics mine.) *Foucha*, 504 U.S. at 83, 112 S. Ct. at 1787. I would hold the sexual predator Statute is an unconstitutional violation of substantive due process.

II

EX POST FACTO AND DOUBLE JEOPARDY

In addition to violating substantive due process, the Statute's commitment provisions violate the constitutional prohibition against ex post facto laws. U.S. Const. art. 1, § 10. A law violates this prohibition if it "makes more burdensome the punishment for a crime, after its commission". *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S. Ct. 2715, 2719, 111 L. Ed. 2d 30 (1990) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169, 46 S. Ct. 68, 68, 70 L. Ed. 216

(1925)). The purpose of the ex post facto prohibition is to give individuals fair warning of the effect of legislative acts and to restrict the power of the State to impose arbitrary or vindictive legislation. *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

The commitment provisions also violate the prohibition on double jeopardy. U.S. Const. amend. 5. The double jeopardy clause protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076-77, 23 L. Ed. 2d 656, 89 S. Ct. 2089, 23 L. Ed. 2d 656 (1969). When the government has already imposed a criminal penalty, the double jeopardy clause precludes the government from seeking additional punishment in a second proceeding if it is dissatisfied with the sanction obtained in the first. *United States v. Halper*, 490 U.S. 435, 449-50, 109 S. Ct. 1892, 1902-03, 104 L. Ed. 2d 487 (1989).

Because RCW 71.09 authorizes retroactive extension of a criminal sentence if the State is dissatisfied with the original length, it violates both of these provisions. The majority argues that these provisions do not apply because the Statute is civil rather than criminal in nature. However, a statute must be deemed criminal in nature when the statute is "so punitive either in purpose or effect" as to negate a legislature's intent to establish a civil statute. *United States v. Ward*, 448 U.S. 242, 248, 100 S. Ct. 2636, 2641, 65 L. Ed. 2d 742 (1980).

The factors to be considered in deciding whether a statute has a criminal or civil purpose include whether the act disavows all interest in punishment, whether it provides treatment, and whether release is possible at any time. *Allen v. Illinois*, 478 U.S. 364, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986).

The statute in *Allen* allowed the State to divert persons charged with crimes from the criminal system to the civil system for treatment of mental illness. In contrast, the

sexually violent predator Statute is not an alternative to criminal imprisonment. It allows the State to seek a criminal conviction against an individual, and only after the individual has completed his or her sentence does the Statute purportedly seek to provide specialized "care and treatment" for the individual. *See* RCW 71.09.030, .060. Far from disavowing criminal punishment, such punishment is an essential component of the Statute's commitment provisions.

Although the Statute provides for treatment, this goal is completely subordinated to punishment. An individual's need for diagnosis and treatment is *never* sufficiently compelling under the Statute until the individual is nearing the end of his or her criminal sentence. The timing alone is a strong indication that the Legislature was less interested in treatment than in confinement.

While both the Illinois statute in *Allen* and the Washington Statute provide for an indefinite period of confinement, there are important procedural differences. In Illinois, an individual may file a petition for release at any time and is entitled to a case review every 6 months. The court is required to hear all petitions. Here a petition for release normally must be authorized by the Department of Social and Health Services. Although an individual may petition over the Department's objection, he or she must then prevail at a show cause hearing in order to obtain a trial. Once a person has petitioned over the Department's objection and been denied, the court is mandated to deny subsequent petitions unless the person can make a showing of changed circumstances in the petition itself. Case reviews are conducted only once a year.

Based on a comparison of these factors, RCW 71.09 is punitive in purpose and effect. Therefore, the prohibitions against ex post facto laws and double jeopardy apply here, and the Statute is unconstitutional.

In conclusion, I would hold that Washington's sexually violent predator Statute, RCW 71.09, violates

petitioners' rights to substantive due process and violates the constitutional prohibition against ex post facto laws and double jeopardy.

UTTER and SMITH, JJ., concur with JOHNSON, J.

CHAPTER 71.09
SEXUALLY VIOLENT PREDATORS

Section

71.09.010. Findings.
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71.09.902 Effective dates—Application—1990 c 3.

71.09.010 Findings.

The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW, which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have antisocial personality features which are unamenable to

existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment act, chapter 71.05 RCW, is inadequate to address the risk to reoffend because during confinement these offenders do not have access to potential victims and therefore they will not engage in an overt act during confinement as required by the involuntary treatment act for continued confinement. The legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act.

Enacted by Laws 1990, ch. 3, § 1001, eff. July 1, 1990.

71.09.020 Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence.

(2) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(3) "Predatory" means acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization.

(4) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child

in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to chapter 71.09 RCW, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

Enacted by Laws 1990, ch. 3, § 1002, eff. July 1, 1990. Amended by Laws 1990, 1st Ex.Sess., ch. 12, § 2, eff. July 1, 1990.

71.09.030 Sexually violent predator petition—Prosecuting attorney or attorney general may file.

When it appears that: (1) The sentence of a person who has been convicted of a sexually violent offense is about to expire, or has expired on, before, or after July 1, 1990; (2) the term of confinement of a person found to have committed a sexually violent offense as a juvenile is about to expire, or has expired on, before, or after July 1, 1990; (3) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW 10.77.090(3); or (4) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW

10.77.020(3); and it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation.

Enacted by Laws 1990, ch. 3, § 1003, eff. July 1, 1990. Amended by Laws 1990, 1st Ex.Sess., ch. 12, § 3, eff. July 1, 1990.

71.09.040 Sexually violent predator petition—Judicial determination—Transfer for evaluation.

Upon the filing of a petition under RCW 71.09.030, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made the judge shall direct that the person be taken into custody and the person shall be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections.

Enacted by Laws 1990, ch. 3, § 1004, eff. July 1, 1990.

71.09.050 Trial—Rights of parties.

Within forty-five days after the filing of a petition pursuant to RCW 71.09.030, the court shall conduct a trial to determine whether the person is a sexually violent predator. At all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist him or her. Whenever any person is subjected to an examination under this chapter, he or she may retain experts or professional persons to perform an examination on their behalf. When the person wishes to be examined by a qualified expert or professional person of his or her own choice, such examiner shall be permitted to

have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf. The person, the prosecuting attorney or attorney general, or the judge shall have the right to demand that the trial be before a jury. If no demand is made, the trial shall be before the court.

Enacted by Laws 1990, ch. 3, § 1005, eff. July 1, 1990.

71.09.060 Trial—Determination—Commitment procedures

(1) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If the state alleges that the prior sexually violent offense that forms the basis for the petition for commitment was an act that was sexually motivated as provided in RCW 71.09.020(4)(c), the state must prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated as defined in RCW 9.94A.030. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services in a secure facility for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care, and treatment shall be provided at a facility operated by the department of social and health services. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release.

(2) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to or has been released pursuant to RCW 10.77.090(3), and his or her commitment is sought pursuant to subsection (1) of this section, the court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to dismissal under RCW 10.77.090(3) that the person committed the act or acts charged. The hearing on this issue must comply with

all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

(3) The state shall comply with RCW 10.77.220 while confining the person pursuant to this chapter. The facility shall not be located on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population.

Enacted by Laws 1990, ch. 3, § 1006, eff. July 1, 1990. Amended by Laws 1990, 1st Ex.Sess., ch. 12, § 4, eff. July 1, 1990.

71.09.070 Annual examinations

Each person committed under this chapter shall have a current examination of his or her mental condition made at least once every year. The person may retain, or if he or she is indigent and so requests, the court may appoint a qualified expert or a professional person to examine him or her, and such expert or professional person shall have access to all records concerning the person. The periodic report shall be provided to the court that committed the person under this chapter.

Enacted by Laws 1990, ch. 3, § 1007, eff. July 1, 1990.

71.09.080 Detention and commitment to conform to constitutional requirements.

The involuntary detention or commitment of persons under this chapter shall conform to constitutional requirements for care and treatment.

Enacted by Laws 1990, ch. 3, § 1008, eff. July 1, 1990.

71.09.090 Petition for release—Procedures.

(1) If the secretary of the department of social and health services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released, the secretary shall authorize the person to petition the court for release. The petition shall be served upon the court and the prosecuting attorney. The court, upon receipt of the petition for release, shall within forty-five days order a hearing. The prosecuting attorney or the attorney general, if requested by the county, shall represent the state, and shall have the right to have the petitioner examined by an expert or professional person of his or her choice. The hearing shall be before a jury if demanded by either the petitioner or the prosecuting attorney or attorney general. The burden of proof shall be upon the prosecuting attorney or attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if discharged is likely to commit predatory acts of sexual violence.

(2) Nothing contained in this chapter shall prohibit the person from otherwise petitioning the court for discharge without the secretary's approval. The secretary shall provide the committed person with an annual written notice of the person's right to petition the court for release over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the annual report. If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she is safe to be at large. The committed person shall have a right to have an attorney represent him or

her at the show cause hearing but the person is not entitled to be present at the show cause hearing. If the court at the show cause hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged, then the court shall set a hearing on the issue. At the hearing, the committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded to the person at the initial commitment proceeding. The prosecuting attorney or the attorney general if requested by the county shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate him or her on his or her behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released will engage in acts of sexual violence.

Enacted by Laws 1990, ch. 3, § 1009, eff. July 1, 1990.

71.09.100 Subsequent petitions.

Nothing in this chapter shall prohibit a person from filing a petition for discharge pursuant to this chapter. However, if a person has previously filed a petition for discharge without the secretary's approval and the court determined, either upon review of the petition or following a hearing, that the petitioner's petition was frivolous or that the petitioner's condition had not so changed that he or she was safe to be at large, then the court shall deny the subsequent petition unless the petition contains facts upon which a court could find that the condition of the petitioner had so changed that a hearing was warranted. Upon receipt of a first or subsequent petition from committed persons without the secretary's approval, the court shall endeavor whenever possible to review the petition and determine if the petition is based upon frivolous grounds and if so shall deny the petition without a hearing.

Enacted by Laws 1990, ch. 3, § 1010, eff. July 1, 1990.

71.09.110 Department of social and health services Duties—Reimbursement.

The department of social and health services shall be responsible for all costs relating to the evaluation and treatment of persons committed to their custody under any provision of this chapter. Reimbursement may be obtained by the department for the cost of care and treatment of persons committed to its custody pursuant to RCW 43.20B.330 through 43.20B.370.

Enacted by Laws 1990, ch. 3, § 1011, eff. July 1, 1990.

71.09.120 Release of information authorized.

In addition to any other information required to be released under this chapter, the department is authorized, pursuant to RCW 4.24.550, to release relevant information that is necessary to protect the public, concerning a specific sexually violent predator committed under this chapter.

Enacted by Laws 1990, ch. 3, § 1012, eff. July 1, 1990.

71.09.900 Index, part headings not law—1990 c 3.

See RCW 18.155.900.

71.09.901 Severability—1990 c 3.

See RCW 18.155.901.

71.09.902 Effective dates—Application—1990 c 3.

See RCW 18.155.902.

Chapter 71.09
SEXUALLY VIOLENT PREDATORS

Sections

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71.09.010 Findings.

The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW, which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment act, chapter 71.05 RCW, is inadequate to address the risk to reoffend because during confinement these offenders do not have access to potential victims and therefore they will not engage in an overt act during confinement as required by the involuntary treatment act for continued confinement. The legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act. [1990 c 3 § 1001.]

71.09.020 Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

(2) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(3) "Likely to engage in predatory acts of sexual violence" means that the person more probably than not will engage in such acts. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.

(4) "Predatory" means acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization.

(5) "Recent overt act" means any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm.

(6) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent

offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to chapter 71.09 RCW, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

(7) "Less restrictive alternative" means court-ordered treatment in a setting less restrictive than total confinement.

(8) "Secretary" means the secretary of social and health services or his or her designee. [1995 c 216 § 1; 1992 c 145 § 17; 1990 1st ex.s. c 12 § 2; 1990 c 3 § 1002.]

Effective date—1990 1st ex.s. c 12: See note following RCW 13.40.020.

71.09.025 Notice to prosecuting attorney prior to release.

(1)(a) When it appears that a person may meet the criteria of a sexually violent predator as defined in RCW 71.09.020(1), the agency with jurisdiction shall refer the person in writing to the prosecuting attorney of the county where that person was charged, three months prior to:

(i) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense;

(ii) The anticipated release from total confinement of a person found to have committed a sexually violent offense as a juvenile;

(iii) Release of a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial pursuant to *RCW 10.77.090(3); or

(iv) Release of a person who has been found not guilty by reason of insanity of a sexually violent offense pursuant to **RCW 10.77.020(3).

(b) The agency shall provide the prosecutor with all relevant information including but not limited to the following information:

(i) A complete copy of the institutional records compiled by the department of corrections relating to the person, and any such out-of-state department of corrections' records, if available;

(ii) A complete copy, if applicable, of any file compiled by the indeterminate sentence review board relating to the person;

(iii) All records relating to the psychological or psychiatric evaluation and/or treatment of the person;

(iv) A current record of all prior arrests and convictions, and full police case reports relating to those arrests and convictions; and

(v) A current mental health evaluation or mental health records review.

(2) This section applies to acts committed before, on, or after March 26, 1992.

(3) The agency, its employees, and officials shall be immune from liability for any good-faith conduct under this section.

(4) As used in this section, "agency with jurisdiction" means that agency with the authority to direct the release of a person serving a sentence or term of confinement and includes the department of corrections, the indeterminate sentence review board, and the department of social and health services. [1995 c 216 § 2; 1992 c 45 § 3.]

Reviser's note: *(1) RCW 10.77.090 was amended by 1998 c 297 § 38, changing subsection (3) to subsection (4).

**(2) RCW 10.77.020 was amended by 1998 c 297 § 30, deleting subsection (3).

Severability—Application—1992 c 45: See notes following RCW 9.94A.151.

71.09.030 Sexually violent predator petition—Filing.

When it appears that: (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement on, before, or after July 1, 1990; (2) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement on, before, or after July 1, 1990; (3) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released on, before, or after July 1, 1990, pursuant to *RCW 10.77.090(3); (4) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW **10.77.020(3), 10.77.110 (1) or (3), or 10.77.150; or (5) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act; and it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation. [1995 c 216 § 3; 1992 c 45 § 4; 1990 1st ex.s. c 12 § 3; 1990 c 3 § 1003.]

Reviser's note: *(1) RCW 10.77.090 was amended by 1998 c 297 § 38, changing subsection (3) to subsection (4).

**(2) RCW 10.77.020 was amended by 1998 c 297 § 30, deleting subsection (3).

Severability—Application—1992 c 45: See notes following RCW 9.94A.151.

Effective date—1990 1st ex.s. c 12: See note following RCW 13.40.020.

71.09.040 Sexually violent predator petition—Probable cause hearing—Judicial determination—Transfer for evaluation.

(1) Upon the filing of a petition under RCW 71.09.030, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made the judge shall direct that the person be taken into custody.

(2) Within seventy-two hours after a person is taken into custody pursuant to subsection (1) of this section, the court shall provide the person with notice of, and an opportunity to appear in person at, a hearing to contest probable cause as to whether the person is a sexually violent predator. At this hearing, the court shall (a) verify the person's identity, and (b) determine whether probable cause exists to believe that the person is a sexually violent predator. At the probable cause hearing, the state may rely upon the petition and certification for determination of probable cause filed pursuant to RCW 71.09.030. The state may supplement this with additional documentary evidence or live testimony.

(3) At the probable cause hearing, the person shall have the following rights in addition to the rights previously specified: (a) To be represented by counsel; (b) to present evidence on his or her behalf; (c) to cross-examine witnesses

who testify against him or her; (d) to view and copy all petitions and reports in the court file.

(4) If the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections. In no event shall the person be released from confinement prior to trial. [1995 c 216 § 4; 1990 c 3 § 1004.]

71.09.050 Trial—Rights of parties.

(1) Within forty-five days after the completion of any hearing held pursuant to RCW 71.09.040, the court shall conduct a trial to determine whether the person is a sexually violent predator. The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced. At all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist him or her. The person shall be confined in a secure facility for the duration of the trial.

(2) Whenever any person is subjected to an examination under this chapter, he or she may retain experts or professional persons to perform an examination on their behalf. When the person wishes to be examined by a qualified expert or professional person of his or her own choice, such examiner shall be permitted to have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall, upon the person's request, assist the person in

obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf.

(3) The person, the prosecuting attorney or attorney general, or the judge shall have the right to demand that the trial be before a twelve-person jury. If no demand is made, the trial shall be before the court. [1995 c 216 § 5; 1990 c 3 § 1005.]

71.09.060 Trial—Determination—Commitment procedures.

(1) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. When the determination is made by a jury, the verdict must be unanimous.

If, on the date that the petition is filed, the person was living in the community after release from custody, the state must also prove beyond a reasonable doubt that the person had committed a recent overt act. If the state alleges that the prior sexually violent offense that forms the basis for the petition for commitment was an act that was sexually motivated as provided in RCW 71.09.020(6)(c), the state must prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated as defined in RCW 9.94A.030. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services for placement in a secure facility operated by the department of social and health services for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe either (a) to be at large, or (b) to be released to a less restrictive alternative as set forth in RCW 71.09.092. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release.

(2) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is

about to or has been released pursuant to *RCW 10.77.090(3), and his or her commitment is sought pursuant to subsection (1) of this section, the court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to dismissal under *RCW 10.77.090(3) that the person committed the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

(3) The state shall comply with RCW 10.77.220 while confining the person pursuant to this chapter, except that during all court proceedings the person shall be detained in a secure facility. The department shall not place the person, even temporarily, in a facility on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population. [1998 c 146 § 1; 1995 c 216 § 6; 1990 1st ex.s. c 12 § 4; 1990 c 3 § 1006.]

***Reviser's note:** RCW 10.77.090 was amended by 1998 c 297 § 38, changing subsection (3) to subsection (4).

Effective date—1998 c 146: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 25, 1998]." [1998 c 146 § 2.]

Effective date—1990 1st ex.s. c 12: See note following RCW 13.40.020.

71.09.070 Annual examinations of persons committed under chapter.

Each person committed under this chapter shall have a current examination of his or her mental condition made at least once every year. The annual report shall include consideration of whether conditional release to a less restrictive alternative is in the best interest of the person and will adequately protect the community. The person may retain, or if he or she is indigent and so requests, the court may appoint a qualified expert or a professional person to examine him or her, and such expert or professional person shall have access to all records concerning the person. The periodic report shall be provided to the court that committed the person under this chapter. [1995 c 216 § 7; 1990 c 3 § 1007.]

71.09.080 Rights of persons committed under this chapter.

(1) Any person subjected to restricted liberty as a sexually violent predator pursuant to this chapter shall not forfeit any legal right or suffer any legal disability as a consequence of any actions taken or orders made, other than as specifically provided in this chapter.

(2) Any person committed pursuant to this chapter has the right to adequate care and individualized treatment. The department of social and health services shall keep

records detailing all medical, expert, and professional care and treatment received by a committed person, and shall keep copies of all reports of periodic examinations made pursuant to this chapter. All such records and reports shall be made available upon request only to: The committed person, his or her attorney, the prosecuting attorney, the court, the protection and advocacy agency, or another expert or professional person who, upon proper showing, demonstrates a need for access to such records.

(3) At the time a person is taken into custody or transferred into a facility pursuant to a petition under this chapter, the professional person in charge of such facility or his or her designee shall take reasonable precautions to inventory and safeguard the personal property of the persons detained or transferred. A copy of the inventory, signed by the staff member making it, shall be given to the person detained and shall, in addition, be open to inspection to any responsible relative, subject to limitations, if any, specifically imposed by the detained person. For purposes of this subsection, "responsible relative" includes the guardian, conservator, attorney, spouse, parent, adult child, or adult brother or sister of the person. The facility shall not disclose the contents of the inventory to any other person without consent of the patient or order of the court.

(4) Nothing in this chapter prohibits a person presently committed from exercising a right presently available to him or her for the purpose of obtaining release from confinement, including the right to petition for a writ of habeas corpus.

(5) No indigent person may be conditionally released or unconditionally discharged under this chapter without suitable clothing, and the secretary shall furnish the person with such sum of money as is required by RCW 72.02.100 for persons without ample funds who are released from correctional institutions. As funds are available, the secretary may provide payment to the indigent persons conditionally

released pursuant to this chapter consistent with the optional provisions of RCW 72.02.100 and 72.02.110, and may adopt rules to do so. [1995 c 216 § 8; 1990 c 3 § 1008.]

71.09.090 Petition for conditional release to less restrictive alternative or unconditional discharge—Procedures.

(1) If the secretary determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged, the secretary shall authorize the person to petition the court for conditional release to a less restrictive alternative or unconditional discharge. The petition shall be served upon the court and the prosecuting attorney. The court, upon receipt of the petition for conditional release to a less restrictive alternative or unconditional discharge, shall within forty-five days order a hearing. The prosecuting attorney or the attorney general, if requested by the county, shall represent the state, and shall have the right to have the petitioner examined by an expert or professional person of his or her choice. The hearing shall be before a jury if demanded by either the petitioner or the prosecuting attorney or attorney general. The burden of proof shall be upon the prosecuting attorney or attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if conditionally released to a less restrictive alternative or unconditionally discharged is likely to engage in predatory acts of sexual violence.

(2) Nothing contained in this chapter shall prohibit the person from otherwise petitioning the court for conditional release to a less restrictive alternative or unconditional discharge without the secretary's approval. The secretary shall provide the committed person with an annual written notice of the person's right to petition the

court for conditional release to a less restrictive alternative or unconditional discharge over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the annual report. If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she is safe to be conditionally released to a less restrictive alternative or unconditionally discharged. The committed person shall have a right to have an attorney represent him or her at the show cause hearing but the person is not entitled to be present at the show cause hearing. If the court at the show cause hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged, then the court shall set a hearing on the issue. At the hearing, the committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded to the person at the initial commitment proceeding. The prosecuting attorney or the attorney general if requested by the county shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate him or her on his or her behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged.

(3) The jurisdiction of the court over a person civilly committed pursuant to this chapter continues until such time

as the person is unconditionally discharged. [1995 c 216 § 9; 1992 c 45 § 7; 1990 c 3 § 1009.]

Severability—Application—1992 c 45: See notes following RCW 9.94A.151.

71.09.092 Conditional release to less restrictive alternative—Findings.

Before the court may enter an order directing conditional release to a less restrictive alternative, it must find the following: (1) The person will be treated by a treatment provider who is qualified to provide such treatment in the state of Washington under chapter 18.155 RCW; (2) the treatment provider has presented a specific course of treatment and has agreed to assume responsibility for such treatment and will report progress to the court on a regular basis, and will report violations immediately to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center; (3) housing exists that is sufficiently secure to protect the community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person, to provide the level of security required by the court, and immediately to report to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center if the person leaves the housing to which he or she has been assigned without authorization; (4) the person is willing to comply with the treatment provider and all requirements imposed by the treatment provider and by the court; and (5) the person is willing to comply with supervision requirements imposed by the department of corrections. [1995 c 216 § 10.]

71.09.094 Conditional release to less restrictive alternative—Verdict.

(1) Upon the conclusion of the evidence in a hearing held pursuant to RCW 71.09.090, if the court finds that there

is no legally sufficient evidentiary basis for a reasonable jury to find that the conditions set forth in RCW 71.09.092 have been met, the court shall grant a motion by the state for a judgment as a matter of law on the issue of conditional release to a less restrictive alternative.

(2) Whenever the issue of conditional release to a less restrictive alternative is submitted to the jury, the court shall instruct the jury to return a verdict in substantially the following form: Has the state proved beyond a reasonable doubt that the proposed less restrictive alternative is not in the best interests of respondent or will not adequately protect the community? Answer: Yes or No. [1995 c 216 § 11.]

71.09.096 Conditional release to less restrictive environment—Judgment—Conditions—Annual review.

(1) If the court or jury determines that conditional release to a less restrictive alternative is in the best interest of the person and will adequately protect the community, and the court determines that the minimum conditions set forth in *section 9 of this act are met, the court shall enter judgment and direct a conditional release.

(2) The court shall impose any additional conditions necessary to ensure compliance with treatment and to protect the community. If the court finds that conditions do not exist that will both ensure the person's compliance with treatment and protect the community, then the person shall be remanded to the custody of the department of social and health services for control, care, and treatment in a secure facility as designated in RCW 71.09.060(1).

(3) If the service provider designated to provide inpatient or outpatient treatment or to monitor or supervise any other terms and conditions of a person's placement in a less restrictive alternative is other than the department of social and health services or the department of corrections, then the service provider so designated must agree in writing to provide such treatment.

(4) Prior to authorizing any release to a less restrictive alternative, the court shall impose such conditions upon the person as are necessary to ensure the safety of the community. The court shall order the department of corrections to investigate the less restrictive alternative and recommend any additional conditions to the court. These conditions shall include, but are not limited to the following: Specification of residence, prohibition of contact with potential or past victims, prohibition of alcohol and other drug use, participation in a specific course of inpatient or outpatient treatment that may include monitoring by the use of polygraph and plethysmograph, supervision by a department of corrections community corrections officer, a requirement that the person remain within the state unless the person receives prior authorization by the court, and any other conditions that the court determines are in the best interest of the person or others. A copy of the conditions of release shall be given to the person and to any designated service providers.

(5) Any service provider designated to provide inpatient or outpatient treatment shall monthly, or as otherwise directed by the court, submit to the court, to the department of social and health services facility from which the person was released, to the prosecutor of the county in which the person was found to be a sexually violent predator, and to the supervising community corrections officer, a report stating whether the person is complying with the terms and conditions of the conditional release to a less restrictive alternative.

(6) Each person released to a less restrictive alternative shall have his or her case reviewed by the court that released him or her no later than one year after such release and annually thereafter until the person is unconditionally discharged. Review may occur in a shorter time or more frequently, if the court, in its discretion on its own motion, or on motion of the person, the secretary, or the

prosecuting attorney so determines. The sole question to be determined by the court is whether the person shall continue to be conditionally released to a less restrictive alternative. The court in making its determination shall be aided by the periodic reports filed pursuant to subsection (5) of this section and the opinions of the secretary and other experts or professional persons. [1995 c 216 § 12.]

***Reviser's note:** The reference to "section 9 of this act" literally translates to the 1995 c 216 amendments to RCW 71.09.090, which appears to be an erroneous reference. Reference to RCW 71.09.092, "section 10 of this act," was apparently intended.

71.09.098 Conditional release to less restrictive alternative—Hearing on revocation or modification—Authority to apprehend conditionally released person.

(1) Any service provider submitting reports pursuant to RCW 71.09.096(5), the supervising community corrections officer, the prosecuting attorney, or the attorney general may petition the court, or the court on its own motion may schedule an immediate hearing, for the purpose of revoking or modifying the terms of the person's conditional release to a less restrictive alternative if the petitioner or the court believes the released person is not complying with the terms and conditions of his or her release or is in need of additional care and treatment.

(2) If the prosecuting attorney, the supervising community corrections officer, or the court, based upon information received by them, reasonably believes that a conditionally released person is not complying with the terms and conditions of his or her conditional release to a less restrictive alternative, the court or community corrections officer may order that the conditionally released person be apprehended and taken into custody until such time as a hearing can be scheduled to determine the facts and whether or not the person's conditional release should be revoked or modified. The court shall be notified before the close of the

next judicial day of the person's apprehension. Both the prosecuting attorney and the conditionally released person shall have the right to request an immediate mental examination of the conditionally released person. If the conditionally released person is indigent, the court shall, upon request, assist him or her in obtaining a qualified expert or professional person to conduct the examination.

(3) The court, upon receiving notification of the person's apprehension, shall promptly schedule a hearing. The issue to be determined is whether the state has proven by a preponderance of the evidence that the conditionally released person did not comply with the terms and conditions of his or her release. Hearsay evidence is admissible if the court finds it otherwise reliable. At the hearing, the court shall determine whether the person shall continue to be conditionally released on the same or modified conditions or whether his or her conditional release shall be revoked and he or she shall be committed to total confinement, subject to release only in accordance with provisions of this chapter. [1995 c 216 § 13.]

71.09.110 Department of social and health services—Duties—Reimbursement.

The department of social and health services shall be responsible for all costs relating to the evaluation and treatment of persons committed to their custody whether in a secure facility or under a less restrictive alternative under any provision of this chapter. Reimbursement may be obtained by the department for the cost of care and treatment of persons committed to its custody whether in a secure facility or under a less restrictive alternative pursuant to RCW 43.20B.330 through 43.20B.370. [1995 c 216 § 14; 1990 c 3 § 1011.]

71.09.115 Record check required for employees of secure facility.

(1) The safety and security needs of the secure facility operated by the department of social and health services pursuant to RCW 71.09.060(1) make it vital that employees working in the facility meet necessary character, suitability, and competency qualifications. The secretary shall require a record check through the Washington state patrol criminal identification system under chapter 10.97 RCW and through the federal bureau of investigation. The record check must include a fingerprint check using a complete Washington state criminal identification fingerprint card. The criminal history record checks shall be at the expense of the department. The secretary shall use the information only in making the initial employment or engagement decision, except as provided in subsection (2) of this section. Further dissemination or use of the record is prohibited.

(2) This section applies to all current employees hired prior to June 6, 1996, who have not previously submitted to a department of social and health services criminal history records check. The secretary shall use the information only in determining whether the current employee meets the necessary character, suitability, and competency requirements for employment or engagement. [1996 c 27 § 1.]

71.09.120 Release of information authorized.

In addition to any other information required to be released under this chapter, the department is authorized, pursuant to RCW 4.24.550, to release relevant information that is necessary to protect the public, concerning a specific sexually violent predator committed under this chapter. [1990 c 3 § 1012.]

71.09.130 Notice of escape or disappearance.

In the event of an escape by a person committed under this chapter from a state institution or the disappearance of such a person while on conditional release, the superintendent or community corrections officer shall

notify the following as appropriate: Local law enforcement officers, other governmental agencies, the person's relatives, and any other appropriate persons about information necessary for the public safety or to assist in the apprehension of the person. [1995 c 216 § 16.]

71.09.140 Notice of conditional release or unconditional discharge—Notice of escape and recapture.

(1) . . the earliest possible date, and in no event later than thirty days before conditional release or unconditional discharge, except in the event of escape, the department of social and health services shall send written notice of conditional release, unconditional discharge, or escape, to the following:

(a) The chief of police of the city, if any, in which the person will reside or in which placement will be made under a less restrictive alternative;

(b) The sheriff of the county in which the person will reside or in which placement will be made under a less restrictive alternative; and

(c) The sheriff of the county where the person was last convicted of a sexually violent offense, if the department does not know where the person will reside.

The department shall notify the state patrol of the release of all sexually violent predators and that information shall be placed in the Washington crime information center for dissemination to all law enforcement.

(2) The same notice as required by subsection (1) of this section shall be sent to the following if such notice has been requested in writing about a specific person found to be a sexually violent predator under this chapter:

(a) The victim or victims of any sexually violent offenses for which the person was convicted in the past or the victim's next of kin if the crime was a homicide. "Next of kin" as used in this section means a person's spouse, parents, siblings, and children;

(b) Any witnesses who testified against the person in his or her commitment trial under RCW 71.09.060; and

(c) Any person specified in writing by the prosecuting attorney.

Information regarding victims, next of kin, or witnesses requesting the notice, information regarding any other person specified in writing by the prosecuting attorney to receive the notice, and the notice are confidential and shall not be available to the committed person.

(3) If a person committed as a sexually violent predator under this chapter escapes from a department of social and health services facility, the department shall immediately notify, by the most reasonable and expedient means available, the chief of police of the city and the sheriff of the county in which the committed person resided immediately before his or her commitment as a sexually violent predator, or immediately before his or her incarceration for his or her most recent offense. If previously requested, the department shall also notify the witnesses and the victims of the sexually violent offenses for which the person was convicted in the past or the victim's next of kin if the crime was a homicide. If the person is recaptured, the department shall send notice to the persons designated in this subsection as soon as possible but in no event later than two working days after the department learns of such recapture.

(4) If the victim or victims of any sexually violent offenses for which the person was convicted in the past or the victim's next of kin, or any witness is under the age of sixteen, the notice required by this section shall be sent to the parents or legal guardian of the child.

(5) The department of social and health services shall send the notices required by this chapter to the last address provided to the department by the requesting party. The

requesting party shall furnish the department with a current address.

(6) Nothing in this section shall impose any liability upon a chief of police of a city or sheriff of a county for failing to request in writing a notice as provided in subsection (1) of this section. [1995 c 216 § 17.]

71.09.200 Escorted leave—Definitions.

For purposes of RCW 71.09.210 through 71.09.230:

(1) "Escorted leave" means a leave of absence from a facility housing persons detained or committed pursuant to this chapter under the continuous supervision of an escort.

(2) "Escort" means a correctional officer or other person approved by the superintendent or the superintendent's designee to accompany a resident on a leave of absence and be in visual or auditory contact with the resident at all times.

(3) "Resident" means a person detained or committed pursuant to this chapter. [1995 c 216 § 18.]

71.09.210 Escorted leave—Conditions.

The superintendent of any facility housing persons detained or committed pursuant to this chapter may, subject to the approval of the secretary, grant escorted leaves of absence to residents confined in such institutions to:

(1) Go to the bedside of the resident's wife, husband, child, mother or father, or other member of the resident's immediate family who is seriously ill;

(2) Attend the funeral of a member of the resident's immediate family listed in subsection (1) of this section; and

(3) Receive necessary medical or dental care which is not available in the institution. [1995 c 216 § 19.]

71.09.220 Escorted leave—Notice.

A resident shall not be allowed to start a leave of absence under RCW 71.09.210 until the secretary, or the secretary's designee, has notified any county and city law enforcement agency having jurisdiction in the area of the resident's destination. [1995 c 216 § 20.]

71.09.230 Escorted leave—Rules.

(1) The secretary is authorized to adopt rules providing for the conditions under which residents will be granted leaves of absence and providing for safeguards to prevent escapes while on leaves of absence. Leaves of absence granted to residents under RCW 71.09.210, however, shall not allow or permit any resident to go beyond the boundaries of this state.

(2) The secretary shall adopt rules requiring reimbursement of the state from the resident granted leave of absence, or the resident's family, for the actual costs incurred arising from any leave of absence granted under the authority of RCW 71.09.210 (1) and (2). No state funds shall be expended in connection with leaves of absence granted under RCW 71.09.210 (1) and (2) unless the resident and the resident's immediate family are indigent and without resources sufficient to reimburse the state for the expenses of such leaves of absence. [1995 c 216 § 21.]

71.09.900 Index, part headings not law—1990 c 3.

See RCW 18.155.900.

71.09.901 Severability—1990 c 3.

See RCW 18.155.901.

71.09.902 Effective dates—Application—1990 c 3.

See RCW 18.155.902.

NO. 99-1185

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MARK SELING, Superintendent,
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court of Appeals concluded that under this Court's precedents a "civil"commitment statute can be held to be punitive if a person confined under it shows by the "clearest proof" that the statute is punitive in its "effect"; held that Mr. Young had alleged facts that could meet this high standard; and remanded this case to the Federal District Court for an evidentiary hearing on this issue. The question presented by the State's petition is therefore:

Is a federal court precluded from ever considering the conditions of confinement -- no matter how onerous and longstanding those conditions may be -- in determining whether a commitment regime the legislature has labeled "civil" is instead punitive in "purpose or effect" under the Due Process, Ex Post Facto, or Double Jeopardy clauses of the Constitution?

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Constitutional Provisions Involved

In addition to the Double Jeopardy Clause of the Fifth Amendment and the Ex Post Facto Clause of Article 1, Section 10, of the U.S. Constitution cited by the state, the Due Process Clauses of the Fifth and Fourteenth Amendments are involved in this case. The Due Process Clause of the Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural Background

Mr. Young filed his petition for writ of habeas corpus in U.S. District Court in 1994, after the Washington Supreme Court upheld, with some Court-initiated amendments, the "sexually violent predator commitment" statute, RCW 71.09. In re Young and Cunningham, 122 Wn.2d 1 (1993). The District Court initially granted his petition, finding that the statute violated due process, double jeopardy, and ex post facto protections. Young v. Weston, 898 F. Supp. 744 (W.D. Wash., 1995). The state appealed to the Ninth Circuit, which, following argument, remanded the case in light of Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 139 L.Ed.2d 450 (1997). Young v. Weston, 122 F.3d 38 (9th Cir. 1997). The District Court on remand denied the petition. Young v. Weston, No. CV-94-00480C (W.D. Wash. Feb. 10, 1998). Mr. Young appealed, arguing that the purpose and effect of the statute are punitive, violating due process, double jeopardy, and ex post facto protections. The Ninth Circuit remanded the case to the District Court for an evidentiary hearing on the question of whether the conditions of Mr. Young's confinement rendered the statute punitive as to him.

Young v.Weston, 192 F.3d 870 (9th Cir. 1999).[1] The state is

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[1] The Court noted at the outset of its opinion that Mr. Young had challenged "the interpretation and implementation of the statute" as violative of due process. The punitive

seeking certiorari in this Court.

Factual Overview

Andre B. Young was to have completed serving his prison sentence for rape in October, 1990. One day before his release, the state obtained a warrant to arrest and transport him to a different prison to be held for prosecution as a sexually violent predator under RCW 71.09. Despite numerous requests to be allowed to come to court in person to face the charges against him, to seek pre-trial release, and to make various motions, Mr. Young was not permitted to come to court until four months later.2 At trial, the state was required to prove a prior conviction or charge of a crime of sexual violence. The state fulfilled this requirement by presenting proof of the conviction for which he had just completed his sentence. Following trial, Mr. Young was committed to the Special Commitment Center (SCC) at Monroe Reformatory. The

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conditions of confinement engage due process protections, as well as double jeopardy and ex post facto protections, as the state's punishment of a person committed for treatment violates due process. The Court's decision to remand can be sustained on that basis alone.

2 The Ninth Circuit noted that "Washington's refusal to allow Young to appear before any court for four months--where those facing commitment under Washington's regular civil commitment statute are entitled to a *prompt* probable cause hearing--may be an indicia of the statute's punitive purpose or effect." Young v. Weston, 192 F.3d 870, 876-877 [emphasis in original].

commitment is indefinite.3

During the pendency of this proceeding, the SCC facility was moved to the McNeil Island Penitentiary. In both locations, SCC has been wholly located within the perimeter of a Department of Corrections-run prison.

Several SCC inmates brought suit under 42 U.S.C. Sec. 1983, resulting in a jury verdict finding unconstitutional conditions. The federal court issued an injunction in June, 1994. SCC is subject to a contempt order for failure to provide constitutionally adequate treatment, and it remains under U.S. District Court supervision. Turay v. Seling, C-91-664 WD.

Judge William Dwyer found on October 1, 1997, that "The central need is to translate into reality a program that exists on paper. What is required is not just a plan but a reality -- the genuine providing of adequate mental health treatment to all SCC residents willing to accept it." Turay v. Seling, Order, Oct. 1, 1997, Appendix A. On November 15, 1999, Judge Dwyer found that "[T]his basic requirement is

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3 To obtain release, Mr. Young must persuade a court that "facts exist that warrant a hearing on whether the person's condition has so changed that he is safe to be conditionally released to a less restrictive alternative or unconditionally discharged." He is not entitled to be present at the "show cause hearing" on this issue. If the court finds that probable cause exists to believe that the person has so changed that he is not likely to engage in predatory acts of sexual violence if released, then the court sets a hearing, at which the burden of proof is on the state. RCW 71.09.090.

still unmet." Findings of Fact, Conclusions of Law, and Order re Motions heard October 19-21, 1999 (filed Nov. 15, 1999), at 14, Turay v.Weston, Appendix B. He found that "the prison's influence remains pervasive and damaging" to the SCC. Id., at 12. Noting that "Compliance should have been complete long ago", the court found that SCC had "intentionally disregarded the injunction's requirements." He found the SCC administrators in contempt of court. Id., at 18,20,22.

During Mr. Young's more than nine years at SCC, SCC staff have made derisive comments based on race, strip searched inmates, have requested inmates to harm other staff members, have provided pornography to inmates. No transition, work release, or aftercare program has been implemented at SCC, despite universal agreement by treatment experts that such programs are essential to treatment. See, Detention of Campbell, 139 Wn.2d 341,369-370(1999),Sanders, J., dissenting.

REASONS WHY THE PETITION SHOULD BE DENIED

Respondent Mr. Young respectfully requests that this Court deny the petition for writ of certiorari. The Court of Appeals relied on this Court's reasoning in Kansas v. Hendricks, supra, in holding that conditions of confinement under an allegedly non-punitive statute may render the statute punitive in effect. The state is mistaken in claiming that the Court of Appeals "departs from" the holdings of Hendricks and Hudson v. United States, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) by reviewing actual conditions of

confinement. Petition at 9. The state's interpretation of Hudson as applied to this case conflicts with a long history of decisions in this Court accepting "as applied" challenges. As the Court of Appeals properly concluded, the actual conditions can demonstrate the punitive purpose and effect of the statute. It therefore is appropriate to remand the case to the district court for an evidentiary hearing on the actual conditions.

The state does not contest that civil committees are entitled to treatment. Petition, 19. And it has not argued here that the conditions at SCC are not punitive. The state cites no authority for its proposition that a state can be divided into administrative and legislative sections for purposes of applying constitutional protections. Petition at 17. At the oral argument in the Ninth Circuit, counsel for the state, Assistant Attorney General Sarah Sappington, told the Court that if the state put a person committed under RCW 71.09 in a general prison population at McNeil Island with no treatment, it still would be civil commitment if the statute on its face said it was civil commitment. See Appendix C. Under the state's argument, such state action would not violate due process, double jeopardy, and ex post facto provisions. Petition at 17, 19.

The evidentiary hearing ordered by the Ninth Circuit has not yet occurred. The case should take its course in the District Court, and a full factual record be completed before

any review in this Court. This case is not ripe for review.

Finally, even should the Court accept the state's argument, that no as-applied challenge is possible in a double jeopardy and ex post facto claim, no such argument exists with regard to the due process claim herein. As the Court of Appeals' decision is sustainable on that ground, this Court should deny review.

(A) This Court Examines the Actual Conditions to Determine Whether A Statute is Punitive in Purpose or Effect

Justice Thomas wrote for the Court in Hendricks, supra.:

> Although we recognize that a "civil label is not always dispositive," Allen, supra, at 369, we will reject the legislature's manifest intent only where a party challenging the statute provides "the clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil." United States v. Ward, 448 U.S. 242, 248-249 (1980).

This Court was concerned about the actual conditions of confinement in Kansas:

> And the conditions surrounding that confinement do not suggest a punitive purpose on the State's part....Because none of the parties argues that people institutionalized under the Kansas general civil commitment statute are subject to punitive conditions, even though they may be involuntarily confined, it is difficult to conclude that persons confined under this Act are being "punished."

138 L.Ed 2d. At 516.

Justice Kennedy, concurring in Hendricks, noting that the Court's opinion denying the ex post facto challenge "concerns Hendricks alone",described exactly the situation in this case:

> If the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were

> adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish....
>
> On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.

138 L. Ed 2d at 521.

In Kansas v. Hendricks,supra, this Court looked not only at the language of the statute but also at the actual conditions of confinement in upholding the constitutionality of the Kansas sexual predator law:

> The State has represented that an individual confined under the Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institution.

138 L.Ed.2d at (emphasis added).[4] The Ninth Circuit, in Young, relied on this language in remanding the case to District Court to determine whether Mr. Young has been incarcerated under punitive conditions. 192 F. 3d 870, 874.

The Hendricks court reaffirmed that if a statute's purpose and effect are punitive, then double jeopardy, ex post facto, and due process are implicated. ("Clearest proof" of punitive purpose and effect will negate "civil" label. 138 L.

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[4] The state misrepresents the Hendricks opinion when it claims that "consistent with its later-issued opinion in Hudson, the Hendricks Court limited its ex post facto and double jeopardy holdings to an examination of the language of the Kansas Act, rather than the conditions actually experienced by Mr. Hendricks." Petition, 15. This is clearly not the case.

Ed 2d 501, 515.) The Court found that in Kansas, "the conditions surrounding that confinement do not suggest a punitive purpose on the State's part." *Id.*, at 515-516. The *effect* of the statute cannot be measured simply by looking at its face. Actual conditions clearly are relevant.5

The Court of Appeals in Mr. Young's case was doing exactly what this Court has prescribed, inquiring about the effect of the statutory scheme. It recognized the constitutional dimensions of differing facts. It noted Mr. Young's allegations:

> Mr. Young is subject to conditions more restrictive than those placed either on true civil commitment detainees or even those placed on state prisoners;
>
> Young has been subject to such conditions for more than seven years [now nine years];
>
> The Special Commitment Center is located wholly within the perimeter of a larger Department of Corrections facility and relies on the Department of Corrections for a host of essential services, including library services, medical care, food, and security;
>
> The conditions of confinement at the Special Commitment Center are not compatible with the Washington statute's treatment purposes;
>
> The conditions and restrictions at the Special Commitment Center are not reasonably related to a legitimate non-punitive goal;
>
> and The conditions of confinement at the Special Commitment Center do not comport with substantive due process....

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5 The majority's review of actual conditions was accompanied by that of the four dissenters in Hendricks who wrote: "...when a State decides offenders can be treated and confines an offender to provide that treatment, but then refuses to provide it, the refusal to treat while a person is fully incapacitated begins to look punitive." Dissent, 138 L. Ed 2d at 533.

> Court-appointed Resident Advocate, psychologist Stanley Greenberg, concluded in his final report, "[b]ecause the SCC [Special Commitment Center] hasn't fundamentally changed over so many years, even with a court injunction, I have come to suspect that it is designed and managed, either overtly or covertly, to punish and confine these men and women to a life sentence without any hope of release to a less restrictive setting";
>
> The Department of Corrections staff's role in running the Special Commitment Center had increased: daily Department of Corrections security "walk-throughs"; continued Department of Corrections responsibility for Special Commitment Center residents' medical care (including requirements that residents be shackled and dressed in prison jumpsuit when taken to the Washington State Reformatory infirmary); and continued Department of Corrections responsibility for meals;
>
> Special Commitment Center residents were housed in units that were, according to Special Master Janice Marques, "clearly inappropriate for individuals in a mental health treatment program";
>
> and There were still no certified sex-offender treatment providers at Special Commitment Center.
>
> Young, 192 F.3d at 192, footnotes omitted.

The Court properly concluded that facts relating to these allegations should be determined by the District Court.

B. Hudson's Review of "Penalizing Mechanisms" Does Not Affect this Court's Reliance on Conditions of Confinement in Hendricks, Reno v. Flores, and Schall in Determining Whether Legislation is Punitive

Several months after Hendricks, in Hudson v. United States, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997), the Court rejected a double jeopardy challenge to an allegedly disproportionate civil penalty, holding that it was error for the lower court to "'asses[s] the character of the actual sanctions imposed,'...rather than, as Kennedy [v. Mendoza-Martinez]6 demanded, evaluating the statute 'on its face' to

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6 372 U.S. 144, 9 L.Ed.2d 644, 83 S.Ct. 554 (1963). It is

determine whether it provided for what amounted to a criminal sanction." 118 S.Ct. 488 at 494.

The state contends that Hudson v. United States, supra, requires that a court may not look at the actual effect of a statute, but only the language on its face, to determine constitutionality under a double jeopardy analysis. This distorts the holding of Hudson and ignores many decisions of this Court which are at the bedrock of constitutional analysis.

Hudson did not purport to reverse Hendricks; the majority in Hudson did not mention Hendricks. The Ninth Circuit properly analyzed the impact of these two cases, and no further review is required.

The key distinction between the two cases lies in Hudson's discussion of the kind of "actual sanction imposed." Hudson noted that for purposes of determining whether a law was civil or criminal for double jeopardy analysis, "[a] court must first ask whether the legislature, 'in establishing the **penalizing mechanism**, indicated whether expressly or impliedly a preference for one label or the other." 118 S.Ct. at 493

important to note that this Court in Kennedy wrote: "Here, although we are convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary, because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive."

[emphasis added].7

A different question was presented in Hendricks: what restraints can be imposed by the State in the context of civil commitment, where no "penalizing mechanism" of any kind is allowed?8

This Court in Hudson emphasized a number of factors which supported its conclusion that the penalty in question was civil. The authority was vested in administrative agencies, not a court. Money penalties and debarment were not historically viewed as punishment. Also, the sanctions imposed did not involve an "affirmative disability or restraint," which Mr. Young's incarceration certainly does.

The distinction can be gleaned from two cases cited in Hudson. The Court cited United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996), "relying on the historical support for the notion that [in rem] forfeitures are civil and thus do not implicate double jeopardy." 118 S.Ct. at 495. It further quoted Flemming v. Nestor, 363 U.S. 603, 617, 4 L.Ed.2d 1435, 80 S.Ct. 1367 (1960), in noting that

7 Quoting United States v. Ward, 448 U.S. 242, 248-249 (1980).

8 The state misunderstands the issue when it says "The Double Jeopardy Clause cannot operate as a sliding scale protection depending on the severity of the punishment." Petition, 16. In a civil commitment, there can be no punishment. If the conditions are punitive, double jeopardy, ex post facto, and due process protections all are violated.

debarment from a profession is "'certainly nothing approaching the 'infamous punishment" of imprisonment.'" 118 S.Ct. at 496.

Ursery found it "absolutely clear" that forfeiture had never been regarded as punishment. 518 U.S. at 291. Flemming found that "[n]o affirmative disability or restraint is imposed" in the denial of social security benefits to deported Communists. It is clear from this pair of cases, as it is from Hendricks and Hudson, that this Court views forfeitures, debarments, and fines in a vastly different light from affirmative restraint such as incarceration.9

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9 Recent federal caselaw leads to the same conclusion. Application of Hudson almost exclusively has been restricted to cases of fines, forfeitures, and debarments.)In S.A. Healy v. Occupational Safety & Health Review, 138 F.2d 686, 688 (7th Cir. 1998, the court found that civil fines imposed under the Occupational Safety and Health Act were non-punitive under the double jeopardy clause, holding:

> The exaction is financial...and money penalties have not been viewed historically as criminal punishment. Hudson, --U.S. at --, 118 S.Ct. at 495. Moreover, as in Hudson the penalty is assessed by the executive branch of the government, which is incompatible with the idea that the sanction is "criminal."

See United States v. Beaty, 147 F.3d 522, 525 (6th Cir. 1998) (taxes on wagering); United States v. $273,964.04 U.S. Currency 164 F.3d 462, 465 (9th Cir. 1999) (forfeiture). Beaty also cites the "affirmative disability" or "infamous punishment" of Nestor v. Flemming in finding no double jeopardy violation.

The only applications of Hudson to actual confinement known to respondents are United States v. Mayes, 158 F.3d 1215 (11th Cir. 1998); and New Jersey v. Black, 153 NJ 438, 710 428, 432 (1998), both finding double jeopardy analysis inapplicable to the loss of "good time" pursuant to prison discipline. Both cases analyze loss of good time as an administrative act pursuant to lawfully imposed punishment,

Further support for this distinction is found in Schall v. Martin, 467 U.S. 253, 269, 81 L.Ed.2d 207, 104 S.Ct. 2403 (1984), where the Court, relying on Kennedy, found specific conditions relevant to an "as applied" constitutional challenge to a juvenile pre-trial detention statute:

> Of course, the mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment. It is axiomatic that "[d]ue process requires that a pretrial detainee not be punished. [cite omitted] Even given, therefore, that pretrial detention may serve legitimate regulatory purposes, it is still necessary to determine whether the terms and conditions of confinement under ss 320.5(3)(b) are in fact compatible with these purposes. Kennedy v. Mendoza-Martinez, 372 U.S. at 168-169, 9 L.Ed.2d 644, 83 S.Ct. 554.

Schall makes clear that Hudson's reliance on the "face" of the statute, rather than its application, is inapplicable to statutes permitting incarceration:

> It may be, of course, that in some circumstances detention of a juvenile would not pass constitutional muster. But the validity of those detentions must be determined on a case-by case basis. Section 320.5(3)(b) is not invalid 'on its face' by reason of the ambiguous statistics and case histories relied upon by the court below.

467 U.S. at 273 [emphasis added]. The Court concluded that pretrial detention of juveniles in the particular case at hand was non-punitive since "[t]he conditions of

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rather than as separate punishment. No one challenged the State's power to impose a criminal sentence on either Mayes or Black. By contrast, there are no permissible grounds for any sanction in the case at hand.

confinement...appear to reflect the regulatory purposes relied upon by the State." Id. at 270.

Similarly, in Reno v. Flores, 507 U.S. 292, 123 L.Ed.2d 1, 16-17, 113 S.Ct. 1439 (1993), the Court found that a statute permitting the detention of illegal immigrants did not constitute punishment, but only upon satisfying itself that the detention featured decent and humane conditions and an absence of "shackles, chains, or barred cells."10

Schall , Flores , and Kennedy are not double jeopardy cases. All three cases involve the definition of punishment for due process purposes. Yet Hudson relies on Kennedy in defining punishment under the double jeopardy and ex post facto clauses. Thus, "punishment" has the same definition for double jeopardy and due process purposes.

The Ninth Circuit performed the precise analysis required by Schall, Flores, and Hendricks, and found, in essence, that the conditions of confinement to which Mr. Young was subjected, unlike those in Schall, did not "appear to reflect the regulatory purposes relied upon by the State." Schall, 467 U.S. at 270. The ruling should stand.

C. This Court Historically has Reviewed the Application

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10 Although the Court characterized the challenge to the statute as a facial one, it was able to find the Statute constitutional only after finding that the government had ameliorated the unconstitutional conditions under which the statute had previously been applied. 123 L.Ed.2d at 16.

of Statutes to Determine Whether the Statutes Themselves were Constitutional.

The State, ignoring Schall and Flores, maintains that the Ninth Circuit's ruling represents a radical departure from settled constitutional doctrine, suggesting that it is improper to examine "the actions of an executive branch administrative agency." Petition at 17. The State cites no authority and is manifestly wrong. For at least 115 years, in cases reviewing the constitutionality of statutes under doctrines as disparate as equal protection, establishment of religion, and the "takings" clause of the Fifth Amendment, this Court has "referred not only to the language of the statute but also to the manner in which it had been administered in practice." Bowen v. Kendrick, 487 U.S. 589, 601, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988).

Perhaps the best known of these cases is Yick Wo v. Hopkins, 118 US 356 (1886), where the court found that even though the language of a law was unexceptional, the fact that it was applied almost exclusively against persons of Chinese ancestry proved the law unconstitutional. The Court held:

> the cases present the ordinances **in actual operation,** and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied...with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners...by the broad and benign

> provisions of the Fourteenth Amendment.... Though the law itself be fair on its face and impartial in appearance, yet, **if it is applied and administered with an evil eye and an unequal hand**, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal protection is still within the prohibition of the Constitution.

118 U.S. at 373 [emphasis added].

In Gomillion v. Lightfoot, 364 U.S. 339 (1960), the Court found nothing facially unjust about legislation adjusting the city limits of Tuskeegee, Alabama. The Court nonetheless held that if the petitioner's allegations were proved:

> The essential inevitable effect of this redefinition of Tuskeegee's boundaries is to remove from the city all but four or five of its 400 Negro voters while not removing a single white voter or resident....
>
> It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this court must judge, and uniformly has judged, statutes that howsoever speciously defined, obviously discriminate against colored persons.

334 U.S. at 342-43. The court thereupon held the law unconstitutional under the Fifteenth Amendment. The court's warning about "specious definitions" is no less applicable to prison conditions described as treatment by the legislature.

In a series of civil rights cases preceding Brown v. Bd. of Education 347 U.S. 483 (1954), this Court again looked to the actual application of legislation to adjudge its constitutionality. In Missouri ex rel Gaines v. Canada, 305

US 337, 83 L.Ed. 208 (1938); McLaurin v. Oklahoma State Regents, 339 US 637, 94 L.Ed. 1149 (1950); and Sweatt v. Painter, 339 US 629, 94 L.Ed 1114 (1950), the Court looked beyond the language of statutes promising "separate but equal" education to African-Americans and, finding the promises unkept, invalidated the laws.

Similarly, in Grand Rapids School District v. Ball, 473 US 373 (1985), the Court overturned a statute providing public school assistance to private schools, not because of the language of the Statute, but because the evidence showed that "[f]orty of the forty-one schools at which the programs operate are sectarian in character." 473 US at 379.

As recently as 1998, the court considered the actual economic impact on employers in finding congressionally mandated health benefits unconstitutional under the "takings clause." Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998).

These cases are consistent with Schall, supra, Flores, supra, Kennedy v. Mendoza-Martinez, supra, and the case at hand. The Ninth Circuit has done nothing new or controversial. It has merely applied a well-established principle: that the application of a statute can prove intent or effect contrary to statutory language.

Hendricks, too, is consistent with this long line of cases from Yick Wo to Apfel. As the State notes, the Court

first noted that "critical language in the act itself demonstrates that the Secretary of Social and Rehabilitation Services, under whose custody sexually violent predators are committed, has an obligation to provide treatment to individuals like Hendricks." 521 U.S. at 367, quoted in Petition at 14. This language is part of the Court's facial analysis of the Kansas statute. The Court then discussed the actual conditions in the Kansas "predator" facility. See supra. This discussion constituted the Court's analysis of the Statute as applied.11

The State's analysis of Hudson would preclude all judicial review of even the most punitive legislation as long as the legislature used properly non-punitive language to mask

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11The State makes much of the fact that the Court did not "remand for additional evidence on the statute as applied" in Allen v. Illinois, 478 U.S. 364 (1986). Pet.at 15. But, unlike the case at hand, there is no indication that anyone raised an "as applied" challenge in Allen. There was thus nothing to remand. This Court nonetheless ruled:

> Petitioner has not demonstrated, and the record does not suggest, that "sexually dangerous persons" in Illinois are confined under conditions incompatible with the State's asserted interest in treatment. Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case.

478 U.S. at 373.

Allen and Young thus follow the principle set forth in Yick Wo and the other cases cited herein: that a facially constitutional statute may be unconstitutional if unconstitutionally applied.

its intent. All constitutional protections would be subservient to the legislature's aptitude for phrasing. The State's argument would thus have devastating effects not only on the continued viability of the constitution but also on legislative integrity. The Court did not allow such a result in Yick Wo, Gomillion, or Grand Rapids, and should not consider it here. The state's position would unravel more than a century of Supreme Court precedent in analyzing statutes as applied to individuals.

D. Statutes are Unconstitutional "As Applied" Only When their Application is Pervasively Unconstitutional

The State raises the spectre of the constitutionality of laws changing year by year as the institutions charged with applying them slip in and out of compliance with constitutional minima. Petition at 17. The State's concerns are answered by Bowen v. Kendrick, supra, an "establishment of religion" case. There, the court found that particular unconstitutional applications of a statute providing aid to private schools could be remedied without invalidating the Statute itself. The Court explained:

> This is not a case like Grand Rapids, where the challenged aid flowed almost entirely to parochial schools. In that case the State's "Shared Time" program was directed specifically at providing certain classes for nonpublic schools, and 40 of 41 of the schools that participated in the program were found to be 'pervasively sectarian'.

487 U.S. at 610-611. In other words, the Court found a

difference between pervasive and incidental unconstitutionality in the application of a statute. There is always the possibility that a previously well-maintained State institution might temporarily fall upon hard times, or, as in Hendricks, allowances might be made for an institution's inadequacies on the basis of its newness. In this case, on the other hand, the Ninth Circuit remanded for a hearing to determine whether conditions during Mr. Young's nine-year incarceration have been punitive. The difference between Hendricks and Young is the difference between Bowen and Grand Rapids: the difference between incidental and pervasive unconstitutionality.

Similarly, the possibility of an unfair civil penalty in Hudson could not overcome "the well established rule" that forfeiture is not punishment. See Ursery, supra. The historic and pervasive unconstitutionality of conditions claimed by Mr. Young under the Washington "predator" act, on the other hand, clearly overcomes any presumption that commitment is non-punitive.

E. The State Cannot Claim the Statute is Constitutional by Accusing the Executive Branch of an Unconstitutional Application of the Statute

The state warns against permitting a rogue executive branch to stymie the allegedly benign intent of the

legislature. 12 This argument was answered by this Court 119 years ago:

> Whoever, by virtue of public position under a state government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the State. This must be, or the constitutional prohibition has no meaning.

Neal v. Delaware, 103 U.S. 370,397, 26 L. Ed 567, 574 (1881).

The legislature has shown than it can respond to issues at SCC when it chooses to do so. While the Federal Court Special Master and virtually all other experts have criticized SCC's failure to establish community treatment resources, the legislature in 1995 eliminated the possibility of release to less restrictive alternatives prior to in-patient commitment, making it far more difficult for residents to win conditional release of any kind. Compare previous and current RCW 71.09.020(1); 71.09.090; 71.09.092; 71.09.094; In re Young, 122 Wn.2d 1 (1993); In re Brooks, 94 Wn.App. 716 (1999); In re

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12 The state cites no authority for its claim that its attorney general can defend the legislature against depredations by the executive branch. The legislature has the power to sue a recalcitrant executive to require that its statutes be implemented, State ex. Rel Grieve v. Martin,63 Wn. 2d 126, 385 P.2d 846 (1963), but the legislature has not done so here. See also, Dept. of Commerce v. US House of Representatives, 525 U.S. 316, 142 L.Ed 2d 797, 119 S.Ct.765 (1999). The Attorney General and the Department of Social and Health Services are servants of the same sovereign: the State of Washington. State v. Dupard, 93 Wn. 2d 268, 273, 609 P.2d 961 (1980), Thompson v. DOL, 138 Wn. 2d 783, 794, _P2d_(1999).

Turay, 139 Wn.2d 379, 986 P.2d 790 (1999). The legislature has done nothing, meanwhile, over the past ten years to address the inadequacies of the SCC treatment program, the prison-like conditions of confinement, or the unavailability of actual community-based aftercare.13 Not even a federal injunction demanding reform of SCC, Turay v. Weston, supra, has spurred the legislature to change.

F. Contrary to the State's Argument, Continued Federal Oversight of the SCC Militates Against Review .

Quoting the Washington Supreme Court, the state contends that the federal court oversight of SCC provides inmates an adequate remedy. Petition at 18, citing In re Turay, 139 Wn.2d 379,420,986 P.2d 790(1999). This abdication of state responsibility weakens the state's case. The State fails to show why certiorari is appropriate at this time.

The State's response to the federal court injunction to date discourages any such optimism. The state has failed to comply with the Court order in Mr. Turay's case for five years,and is in contempt for failure to comply with the injunction. See Order re Motions heard October 19-21, 1999

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13 Under RCW 71.05.025, persons committed under the Involuntary Treatment Act, the traditional civil commitment statute, have access to all of the community treatment services offered under RCW 71.24, the Community Mental Health Services Act. By contrast, the legislature has failed to establish any community services for persons committed under RCW 71.09.

(file Nov. 15, 1999), Turay v. Weston, Appendix B. The federal court in Turay v. Weston may sanction the State of Washington thousands of dollars. Mr. Young's right to be free of successive punishments cannot be subject to the State's ability to absorb sanctions. The Court of Appeals ruling on his habeas petition should stand.

To argue that Mr. Young has a meaningful remedy in an action pursuant to 42 U.S.C. Sec. 1983, while refusing to comply with the orders issued in that action, is to mock the rights sought to be protected.

G. Double Jeopardy and Ex Post Facto Protections Apply Because the Washington Statute Requires a Predicate Element of a Prior Conviction or Criminal Charge

The state misapprehends the law when it argues that double jeopardy and ex post facto protections do not apply to Washington's statute because it does not address the "same offense". Petition, 20-21. It argues that Hendricks is controlling in its finding that the Kansas law does not "make commission of a specified 'offense' the basis for invoking the commitment proceedings." Petition, 21, citing 521 U.S. at 370. In effect, the state argues, the prior conviction is used only for evidentiary purposes, not as a predicate for the "predator" prosecution. Pet. p.21. The state is in error.

The Hendricks court found that in Kansas, the prior conviction was not an "element" of the charge of being a sexually violent predator. 521 U.S. at 370. So if conditions

were punitive, which the Court found they were not in Kansas, the double jeopardy clause would not apply.

In Washington, the prior conviction of a sexually violent offense is in fact an element to be proven, a predicate to the prosecution. In Mr. Young's case, the prosecutor's charging document alleged that Mr. Young had been convicted of a specific sexually violent offense, the sentence for which was about to expire. Prosecutor Petition, Appendix D. At trial, the court instructed the jury that to find Mr. Young to be a sexually violent predator they must find "each of the following elements" beyond a reasonable doubt, including that he had been "convicted of a crime of sexual violence: specifically, of an act defined in Title 9A RCW as rape in the first degree...." Instruction No. 8, Appendix E.

Unlike the situation described by the Court in Hendricks, where "past behavior...is used...solely for evidentiary purposes", 521 U.S. at 371, the Washington prosecution may not occur without proof beyond a reasonable doubt of the element of a prior conviction of a sexually violent offense. Clearly, the prior conviction is a predicate of the prosecution, and both double jeopardy and ex post facto protections apply.

The Washington courts are clear that the prior conviction is a predicate for a "predator" prosecution. One man, Jerry Sharp, obtained a dismissal of the "predator" prosecution against him when his prior conviction was reversed on appeal.

Assistant Attorney General Sappington provided a declaration in Mr. Sharp's case, stating that when the court of appeals reversed Mr. Sharp's convictions for sexually violent offenses, "the State was required by law to dismiss its petition." Appendix F. The trial court dismissed the predator petition against him because the court no longer had jurisdiction, the Court of Appeals having reversed the convictions. Order, Appendix G.

In Detention of Twining, 77 Wn. App. 882, 888, 894 P.2d 1331 (1995), the Washington Court of Appeals noted that "the Legislature requires that the suspected sexual predator ...must have been convicted or charged with a crime of sexual violence. RCW 71.09.020(1)."

Double jeopardy and ex post facto protections are engaged by the Washington practice, which resulted in Mr. Young's incarceration as a "predator" based on the same offense for which he was imprisoned, where the state maintains a "commitment" facility which in fact is punitive.

H. The State's Concern About "National Implications" Is Misplaced

The state suggests that the Court of Appeals decision casts doubt on the validity of laws in thirteen other states. Petition at 19. This case involves only Washington State, and by its terms, only Andre Young. The State's argument presumes widespread defiance by the States of the constitutional

mandate to provide treatment. This Court cannot assume that thirteen other states also are refusing to provide constitutionally required treatment, or that courts reviewing those statutes would fail to follow the law.[14]

I. The Conflict Between The Ninth Circuit and the Washington Supreme Court is Not A Reason to Grant Review in this Case

The state argues that this Court should grant review because the Washington Supreme Court has taken a different view of the issues than the U.S. Court of Appeals, citing In re Turay, supra. Petition at 10. Supreme Court Rule 10 (a) does list as a reason to consider certiorari that " a United States court of appeals ...has decided an important federal question in a way that conflicts with a decision by a state court of last resort...." That reason alone applied to habeas corpus cases would result in the Court taking review of every decision in which a District Court grants an evidentiary hearing which the state court denied. Rule 10 also states: "A petition for a writ of certiorari will be granted only for compelling reasons."

The state does not mention the companion case to Turay,

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[14] The state also is in error when it suggests that traditional civil commitment laws are threatened by an as-applied analysis. Petition, 20.The reality is that if a person either is not mentally ill or the facility to which he is civilly committed is punitive, then the detention is not permissible as civil commitment. Foucha v. Louisiana, 504 U.S. 71, 118 L.Ed.2d 437, 112 S.Ct 1780 (1992)

Detention of Campbell, 139 Wn.2d 341 (1999). In Campbell ,the court barely acknowledged Turay with a single "but see" reference, 139 Wn.2d 341,348, and then undertook its own review of the actual conditions of confinement. The court wrote:

> To the extent Campbell's claim is proper, he must show by "'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' that the proceeding be civil...."

citing Allen v. Illinois, 478 U.S. 364,369 (1986), 139 Wn. 2d at 349. In a footnote, the Court referred to the Ninth Circuit decision as deciding "nothing other than petitioner there is entitled to an evidentiary hearing on his claims." 139 Wn.2d 341, 349, fn 2.

While the Turay court found that the conditions of confinement did not implicate the legality of the commitment order, the Campbell decision, issued the same day as Turay, entertained the argument. In Mr. Young's case, review in this Court should not occur before full development of the facts in the District Court.

J. The Court of Appeals Decision Can Be Affirmed on Due Process Grounds

Even should this Court adopt the state's argument that an as-applied challenge can never be heard to raise double jeopardy and ex post facto issues, there is no such claim regarding due process. If the conditions are punitive, then the commitment violates due process by imprisoning Mr. Young

under a "treatment" scheme which in fact is punishment. Reno v. Flores, supra; Zinermon v. Burch, 494 U.S. 113, 125, 108 L.Ed.2d 100, 110 S.Ct. 975, 983 (1990). The Ninth Circuit's opinion can be upheld on due process grounds, and this Court need not accept review. See Blum v. Bacon, 457 U.S. 132, 137,fn.5, 72 L.Ed 2d 728, 102 S.Ct. 2355(1982): "It is well accepted, however,...that an appellee may rely upon any matter appearing in the record in support of the judgment below." The Blum Court noted that it can affirm a judgment on a different legal basis than the court below adopted.

K. This Case is Not Ripe for Review

Finally, this case is not ripe for review. As this Court wrote in Texas v. United States, 523 U.S. 296, 140 L.Ed 2d 406, 410-411, 118 S.Ct. _ (1998): "A claim is not ripe for adjudication if it rests upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" [citation omitted.] Also, this Court has written: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable". Spector Motor Service, Inc. v. McLaughlin, 323 U. S. 101, 105 (1944), cited in Dept. of Commerce v. US House of Representatives, 525 U.S. 316, 142 L.Ed 2d 797, 119 S.Ct.765 (1999).

Conclusion

This Court should deny the petition for writ of certiorari.

Respectfully submitted this 17th day of February, 2000.

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EDITOR'S NOTE

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Supreme Court, U.S.
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NO. 99-1185

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MARK SELING, Superintendent,
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

APPENDIX TO BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

ROBERT C. BORUCHOWITZ
(Counsel of Record)
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Appendix A

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AT SEATTLE
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BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD G. TURAY, Plaintiff, v. MARK SELING, et al., Defendants.	NO. C91-664WD ORDER ON PLAINTIFF'S RENEWED MOTION FOR CONTEMPT AND DEFENDANTS' RENEWED MOTION FOR RELEASE FROM INJUNCTION

Plaintiff is a resident of the Special Commitment Center ("SCC") at Monroe, Washington, having been civilly committed pursuant to a Washington statute, RCW ch. 71.09, as a violent sexual predator. He sued in this court alleging several violations related to his conditions of confinement. At a trial in 1994, the jury found for defendants on all claims but one, i.e., that defendants had failed to provide plaintiff with constitutionally adequate mental health treatment. On June 3, 1994, an injunction was issued which required the defendants to bring the SCC treatment program into compliance with constitutional standards. Dkt. # 220. On September 22, 1994, Dr. Janice K. Marques was appointed as special master to assist is this process. Dkt. #

261. Dr. Marques has been working with the defendants and SCC residents since that time. She has submitted twelve reports to the court in regard to progress toward compliance and areas in which further work is needed.

On March 6, 1996, a hearing was held on plaintiff's motion for contempt and defendants' motion for release from the injunction. Evidence was received and argument by counsel and amici curiae was heard. An order was entered denying the contempt motion and keeping the injunction in force. Dkt. # 468. Later 1996, by agreement of counsel, eight other SCC residents were allowed to intervene as plaintiffs for the limited purpose of participating in the administration and enforcement of the injunction. Dkt. # 520.

On January 13, 1997, a hearing was held on plaintiff's renewed motion for contempt, in which the plaintiff-intervenors joined, and defendants' motion for release from the injunction. The court heard testimony by the special master and the ombudsm working with SCC, and argument of counsel and amici curiae. At plaintiffs' request, the district judge visited SCC on January 1997, to view the facility. An order dated February 4, 1997, w entered finding that while defendants had made substantial prog ress toward compliance with the injunction, full compliance had not yet been achieved. The motion for contempt was denied and injunction was continued in effect. Dkt. # 645.

Plaintiff, joined by plaintiff-intervenors, now renews his motion for contempt, and defendants renew their motion for rel

from the injunction. Both sides have submitted thorough briefs and declarations. A hearing was held on September 22, 1997, in which the court heard testimony from the special master; from plaintiff-intervenors Herman Paschke, Joel Reimer, and Ronald Petersen; and from defendants Mark Seling and Robert Smith, who are, respectively, the superintendent and clinical director of th SCC.

The February 4, 1997, order stated that the court would expect compliance with the injunction to be complete by the time of the next hearing. The first question is whether that has been achieved. The test is whether defendants now provide plaintiff and the intervenors with access to mental health treatment that gives them a realistic opportunity to be cured or to improve the mental condition for which they were confined. See Youngberg v. Romeo, 457 U.S. 307, 319-22 (1982); Ohlinger v. Watson, 652 F.2d 778 (9th Cir. 1980).

The evidence shows that progress has continued to be made a SCC, but that compliance is not yet complete. Under the leadership of Dr. Seling and Dr. Smith, and with the help of the speci master, a clear policy for staff training has been adopted, and resources are available to implement it. Comprehensive treatmen plans are being developed to guide the individualized treatment residents. A treatment database is in place to track the delive of services. A policy has been adopted for community re-entry. Substantial efforts are being made to improve trust and rapport between the residents and the staff. In that regard, the superi

tendent's testimony at the September 22 hearing recognized that the injunction had been necessary, and the residents' testimony suggested a growing willingness among the population to accept treatment and end hostilities with the SCC. It appears that the clinical director will be able to spend more time on the living unit than has heretofore been done. A grievance policy has been implemented, and a resident advocate, ombudsman, and dispute resolution resource are in place. An advisory board has been formed to conduct ongoing oversight of the program at SCC, and an independent inspection of care review by mental health professionals has been initiated.

Notwithstanding the foregoing improvements, the defendants have not yet achieved full compliance with the injunction. The central need is to translate into reality a program that exists on paper. Only recently has the Supreme Court removed the long-standing doubt over the constitutionality of statutes such as the one establishing the SCC. See Kansas v. Hendricks, 521 U.S. ---, 138 L. Ed. 2d 501 (1997). The program itself, as both Dr. Marques and Dr. Seling testified, is new. What is required is not just a plan but a reality -- the genuine providing of adequate mental health treatment to all SCC residents willing to accept it. The special master testified as to some of the specific elements that illustrate a fully operational program: that the staff members understand the treatment model and their roles within it; that the delivery of services be effective and consistent across treatment teams; that residents know what they must do to move toward

release and where they are in the treatment process; that there be ongoing monitoring of the treatment process; that measures of progress be correlated to the goals of treatment; that the residents know the program policies; that policy enforcement be consistent; that the residents be treated with respect; and that the program be able to deal with the long-term needs of those not engaged in treatment.

The overcrowded physical plant at SCC remains a serious obstacle to providing constitutionally adequate mental health treatment. This problem will only be exacerbated as the SCC population grows. A change of location is under consideration by the Washington State Department of Social and Health Services and the Department of Corrections, but no decision has been made. McNeil Island, Washington, has been proposed as a new site, and clearly would be superior to any attempt to expand the existing facility. To enhance the prospects for achieving compliance with the injunction, SCC should be moved to a better facility as soon as possible.

Accordingly, the injunction will remain in force and the special master will continue to serve pending further order of the court. Defendants' motion to dissolve the injunction is denied.

Plaintiff's motion for contempt is also denied. For civil contempt to occur, it must be shown that a party has failed to take all reasonable steps within its power to comply with a court order. In re Dual-Deck Video Cassette Antitrust Litigation, 10 F.3d 693, 695 (9th Cir. 1993). In this complex situation, the

evidence does not show that the defendants have failed to take reasonable steps to comply with the injunction.

The injunction should remain in force no longer than necessary to attain full compliance. This may take a year, as plaintiff and the plaintiff-intervenors suggest, or it may take less time. Accordingly, the following schedule is now adopted: A report by the special master, using the process heretofore in effect, will be due on April 20, 1998; a further report, if necessary, will be due on September 28, 1998. If the injunction is not dissolved earlier, a hearing as to compliance will be held at 9:00 a.m. on October 5, 1998. Any party may move for contempt or for dissolution of the injunction before the scheduled hearing.

The clerk is directed to send copies of this order to all counsel of record, to the special master, and to amici curiae.

Dated: October 1, 1997.

William L. Dwyer
United States District Judge

Appendix B

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AT SEATTLE
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WESTERN DISTRICT OF WASHINGTON
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD G. TURAY,

Plaintiff,

v.

MARK SELING, et al.,

Defendants.

NO. C91-664WD

JERRY R. SHARP, et al.,

Plaintiffs,

v.

MARK SELING, et al.,

Defendants.

NO. C94-121WD

RANDY PEDERSEN, et al.,

Plaintiffs,

v.

TIM HILL, et al.,

Defendants.

NO. C94-211WD

JOHN F. HALL, et al.,

Plaintiffs,

v.

LYLE QUASIM, et al.,

Defendants.

NO. C95-1111WD

RONALD PETERSEN, et al.,

Plaintiffs,

v.

WILLIAM DEHMER, et al.,

Defendants.

NO. C96-415WD

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE MOTIONS HEARD OCTOBER 19-21, 1999

I. INTRODUCTION

These cases, consolidated for purposes of injunctive relief, involve the conditions of confinement of persons civilly committed as sexually violent predators at the Special Commitment Center ("SCC") at McNeil Island, Washington, pursuant to a Washington statute, RCW ch. 71.09. The SCC is administered by the State of Washington's Department of Social and Health Services ("DSHS"). It is located within the perimeter of the McNeil Island Correctional Center ("MICC"), a prison administered by the Department of Corrections ("DOC"). The plaintiffs are residents of the SCC; the defendants are the SCC's superintendent and clinical director.[1] The history of these cases is thoroughly set out in the orders entered on November 25 and December 23, 1998 (Dkt. ## 1026 and 1067 in the Turay case), and need not be repeated here. In brief, the Fourteenth Amendment Due

[1]Dr. Mark Seling, the superintendent, has been and remains a defendant. By stipulation of the parties, Dr. Vincent Gollogly, the acting clinical director, is hereby substituted for the recently-resigned Dr. Robert Smith as co-defendant.

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Process Clause requires state officials to provide civilly committed persons with access to mental health treatment that gives them a realistic opportunity to be cured or to improve the mental condition for which they were confined. See Youngberg v. Romeo, 457 U.S. 307, 319-22 (1982). This rule applies to sex offenders, and "[l]ack of funds, staff or facilities cannot justify the State's failure to provide [those confined] with that treatment necessary for rehabilitation." Ohlinger v. Watson, 652 F.2d 775, 778-79 (9th Cir. 1980). The Youngberg constitutional standard "determines whether a particular decision has substantially met professionally accepted minimum standards." Society for Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d 1239, 1248 (2nd Cir. 1984). In the present cases, the departures from professionally accepted minimum standards have been so substantial "as to demonstrate that the person responsible actually did not base the decision on such a judgment." Youngberg, 457 U.S. at 323. Following a 1994 jury verdict adverse in part to defendants, and findings made by the court, the defendants were enjoined on June 3, 1994, to take certain steps to make constitutionally adequate mental health treatment available to the SCC residents. When progress was slow, a special master – Dr. Janice K. Marques, who had been nominated by defendants – was appointed to assist defendants in achieving compliance and to submit reports to the court. Dr. Marques has now submitted sixteen reports. The court has monitored injunction compliance and has held several hearings on plaintiffs' motions for a finding of contempt and defendants' motions for release from the injunction. On each occasion the court has found areas of improvement but a continuing failure to afford constitutionally adequate mental health treatment. The findings have concerned the staffing, staff training, treatment plans and programs, and treatment environment at the SCC. The findings and conclusions entered on November 25, 1998, following an evidentiary hearing, culminated in an order enjoining the defendants to take specific steps to achieve compliance with the injunction. The order of December 23, 1998, amended the November 25 order in two respects and denied a stay of the injunction pending defendants' appeal to the Ninth Circuit.

A further hearing on injunction compliance was held in open court on May 18, 1999.[2] The court found again that progress had been made but that the SCC still failed to meet constitutional and professional minimum standards for providing mental health treatment to persons civilly committed, and that the defendants had not yet complied, or substantially complied, with the injunction. The defendants were enjoined to complete the steps required by the order of November 25, 1998, as amended by the order of December 23, 1998; the special master's fifteenth report dated May 6, 1999, was adopted as a statement of work remaining to be done. Counsel for defendants stated at the hearing that some of the steps called for by the fifteenth report could be accomplished within several weeks, while others would take until about the end of 1999. Plaintiffs' renewed motion for contempt, and defendants' renewed motion for dissolution of the injunction, were denied. A further evidentiary hearing was scheduled for October 19, 1999, to be preceded by a further report by the special master. See Order on Renewed Motions for Contempt and for Dissolution of Injunction, May 27, 1999.

As scheduled, a three-day evidentiary hearing on injunction compliance was held on October 19-21, 1999. Counsel and some plaintiffs were present in person (all plaintiffs were enabled to attend, if they chose to, by a court order issued in advance of the hearing). The motions on which evidence was taken were plaintiffs' motion for contempt and sanctions, plaintiffs' separate motion for contempt regarding the SCC's telephone facilities, and defendants' motion to change the ombudsman provider.

At the October 1999 hearing, defendants did not contend that injunction compliance has been achieved, and did not seek dissolution of the injunction. Instead, they recognized through the

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[2]Fed. R. Civ. P. 62(c) provides that "[w]hen an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal on such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." A contempt finding may be made, and sanctions imposed, while an appeal from an injunction is pending. See, e.g., Vac-Air Inc. v. John Mohr & Sons, Inc., 54 F.R.D. 580 (E.D. Wis. 1972), citing Howat v. Kansas, 258 U.S. 181, 189-190 (1922).

testimony of managerial employees, and through counsel, that minimum professional standards for treating sex offenders are not yet fully met and that the goal of providing constitutionally adequate mental health treatment is still unattained. Defendants' Revised Proposed Findings of Fact and Conclusions of Law, filed on November 1, include the following at page seven: "While defendants have demonstrated progress in a number of areas, they have not yet achieved total compliance with the November 25, 1998, injunction." Defendants' proposed order provides that they "will continue to be enjoined" with certain specific directions. Id. at 8. Defendants, however, oppose any finding of contempt or the imposition of sanctions, noting that "[i]t is not unusual for such injunctions to last many years." Id. at 1.

The importance of injunction compliance in these cases is underscored by two Washington Supreme Court decisions filed on October 21, 1999, In re Detention of Turay, No. 64100-5, 1999 WL 958446, and Campbell v. Washington, No. 63986-8, 1999 WL 958445. The state supreme court there declined by 6-2 votes to order two SCC residents released, holding that their remedies of injunctive relief and damages were sufficient and citing the present injunction as demonstrating that constitutionally adequate mental health treatment can be provided. The federal injunction, the state court held, gives residents "an adequate remedy that will guarantee that conditions at the SCC will meet or exceed constitutional standards." Turay, 1999 WL 958446 at *19. See also Campbell, 1999 WL 958445 at *4 ("Remediation is already ongoing under the direction of the federal district court.").

Also of importance is Young v. Weston, No. 98-35377, 1999 WL 718467 (9th Cir., Sept. 16, 1999), in which the Ninth Circuit held that while RCW ch. 71.09 is constitutional on its face, conditions of confinement at the SCC could render it punitive as applied, in which event the ex post facto and double jeopardy clauses could be violated.[3] The issue in the present cases is limited to whether constitutionally adequate mental health treatment is being afforded; that question is related,

[3]The Ninth Circuit granted a motion to stay the issuance of the mandate in Young on October 21, 1999.

but not identical, to the question whether the conditions of confinement are punitive for purposes of ex post facto and double jeopardy analysis. The latter issue is not before the court in these cases. Nevertheless, the present injunction proceedings are important not just in their own right but to the above-cited cases and to others brought by SCC residents in state and federal courts.

II. FINDINGS OF FACT

At the October 19-21, 1999, hearing, the court heard testimony from Dr. Janice Marques (the special master), Dr. Mark Seling (the SCC superintendent), Dr. Vincent Gollogly (the acting clinical director), Dr. Robert Smith (the former clinical director), Lee Mosley (the resident advocate), Samuel Elwonger (the ombudsman), Keith Chiefmoon (the Native American chaplain), plaintiffs Ronald Petersen and Samuel Donaghe, current and former SCC staff members, and family members of some SCC residents. Exhibits were received in evidence. All parties rested and submitted post-hearing proposed findings and conclusions. The following findings have been established by clear and convincing evidence.

1. Court's Ex. 1, a summary prepared by Dr. Marques for a recent national meeting of the Association for the Treatment of Sexual Abusers ("ATSA"), sets out the accepted professional standards for providing mental health treatment to persons confined in a facility such as the SCC. It is essentially the same as the professional standards summarized in Finding of Fact 4, pages 11-12, in the order of November 25, 1998. In their testimony at the recent hearing, both the special master and the SCC superintendent confirmed the correctness and applicability of the standards set out in Court's Ex. 1.

2. On October 4, 1999, pursuant to Washington law, an Inspection of Care 1999 Committee Report ("IOC Report") was issued concerning the SCC. The committee members were a certified sex offender treatment provider, the chief operating officer of a child study and treatment center, a clinical nurse specialist, and a psychiatrist. Following inspection visits to the facility, record reviews, and interviews of staff and residents, the committee made findings of deficiencies similar to

those found by the court and the special master in the present cases. The IOC report was received in evidence as Plaintiffs' Ex. 1. It adds a further serious concern, that of inadequate medical staff and facilities for the SCC residents. The SCC superintendent has expressed agreement with the findings and recommendations of both the IOC and the special master.

3. Shortly before the October 1999 hearing, the DSHS made several improvements in the conditions at the SCC. These belated changes show that injunction compliance can be achieved if the necessary effort is made. There is still a failure, nevertheless, to meet professional minimum standards and to afford constitutionally adequate mental health treatment. The shortcomings do not reflect the judgment of any qualified professional; they exist, and have existed, despite uncontradicted professional opinion to the contrary. The evidence establishes the following in regard to the steps required by the November 25, 1998, order as amended by the December 23, 1998, order (the amendments are noted in brackets):

> (a) To carry out additional staff training at the SCC, with new residential care staff to finish the orientation training before beginning work on the unit, residential care and clinical staff to complete mental health training within four months of commencing their employment, and advanced training on the treatment of sexual deviance to be provided.

This requirement corresponds to items A and E of the original 1994 injunction, which required defendants to adopt and implement a plan for initial and ongoing training and/or hiring of competent sex offender therapists at SCC and to provide a psychologist or psychiatrist expert in the diagnosis and treatment of sex offenders to supervise the clinical work of treatment staff, including monitoring of the treatment plans of individual residents, and to consult with staff regarding specific issues or concerns about therapy that may arise. The fifteenth report of the special master, approved and adopted by the court, identified four steps needed in regard to this part of the injunction: (1) implement strategies for reducing clinical and residential staff turnover; (2) document how and when remaining staff training will be completed; (3) structure and document the supervision provided

to therapists, including specific feedback on delivery of treatment components; and (4) strengthen communication and teamwork between clinical and residential staff.

This requirement has not adequately been met. Some staff members lack the necessary training, and others have received it untimely. Among the results are confusion as to staff roles and, in some instances, inappropriate behavior by staff toward residents. Some residential staff have not been sufficiently trained to understand the SCC's clinical mission. These problems are related to a high turnover rate and to recurring vacancies, some of which still exist. There has been a vacancy since August 1999 in the permanent clinical director's position.

The staff-to-resident population ratio has worsened. The staff includes dedicated and capable people, and recent budgetary approvals for additional positions, and hirings shortly before the recent hearing (including the hiring in August of a full-time executive assistant), show that adequate recruitment and training can be achieved; but at this point neither has been.

> (b) To provide a coherent and individualized treatment program for each resident complete with understandable progress goals and a road map showing the way to improvement and release, such plan to include the components recognized as necessary for maximum treatment potential.

This requirement corresponds to items C and D of the original injunction, which ordered SCC to implement a treatment program for residents that includes all therapy components recognized as necessary by prevailing professional standards in comparable programs where participation is coerced, including the involvement of spouses and family members in the treatment of residents, and plans for encouraging the visitation and support of families, and to develop and maintain individual treatment plans for residents that include objective benchmarks of improvement so as to document, measure, and guide an individual's progress in therapy. The fifteenth report of the special master identified four steps needed in regard to this part of the injunction: (1) develop and implement comprehensive, individualized treatment plans that follow a standard format and are approved by the clinical director; (2) ensure that appropriate, individualized treatment is provided to residents with

special needs (e.g., major mental disorders, neurological impairments and developmental disabilities), including hiring and/or contracting with experts to provide specialized assessment and treatment planning for these individuals; (3) keep systematic records of resident participation and progress during each trimester, provide specific feedback on performance and clearly specify goals that must be achieved for advancement to the next treatment phase; and (4) further develop the structures (e.g., treatment, supervision and housing options) that are required for community transition and demonstrate their viability.

As noted in the IOC Report, "there has been a definite improvement in the treatment offered." Plaintiffs' Ex. 1 at 8. Treatment plans have improved in both quality and quantity. Nevertheless, as all parties recognized at the recent hearing, the plans for some residents are inadequate in that they fail to address individual histories, lack clarity, and fail to consider those with special needs (perhaps twenty-five percent of the population). As for the road map to release or to a less restrictive alternative ("LRA"), three residents have advanced recently to Level 5 (the highest being 7), which is a first and is encouraging. But the level system in general remains inadequate and there is still no half-way house (despite the Advisory Board's recommendation) and no systematic program for LRAs. For most residents, there is no clear track to improvement and release. These basic treatment requirements were ordered long ago; the continued failure to achieve full compliance is unexcused.

> (c) To make adequate provision for participation by residents' families in rehabilitation efforts, including setting aside a room for visits by family members, permitting family visits with reasonable frequency, and allowing prompt telephone access to residents in cases of family emergency, consistent with security.

This requirement also corresponds to items C and D of the injunction. The fifteenth report of the special master noted that SCC must ensure that family relationships and support are addressed in treatment plans and that appropriate counseling is provided on a timely basis. The report also referenced the need for SCC to install a system to allow outgoing calls and to assign a social worker to the living unit for the purpose, among others, of increasing family outreach.

Family involvement in treatment has been an agreed step from the beginning but is still largely unrealized. Defendants continue to acknowledge its importance but SCC has failed to encourage family support and in many cases has discouraged it. Testimony from several witnesses at the hearing confirmed that SCC has failed to respond to family members who have asked for assistance, leading family members to feel rejected, out of touch with their confined relatives, and hopeless. Little has been done to develop family support and a social network policy. A July 1999 social event for residents in treatment and family visitors was a success, but remains an isolated occurrence. Dr. Seling testified over a year ago that he would consider ways to involve family members as a way of encouraging residents not in treatment to get involved, yet SCC's policy, adopted in June 1999, makes regular family counseling available only to residents involved in treatment, and nothing has been done to address or encourage family support for the non-treatment group.

> (d) Pending the construction of a separate treatment-oriented facility, to reduce the negative effects of the current connection with MICC by taking the following steps:
>
> (i) Eliminate the routine strip searches of SCC residents following every visit [time for compliance extended to January 22, 1999];
>
> (ii) Eliminate the monitoring of residents' telephone calls and the bar on outgoing calls (other than collect);
>
> (iii) Negotiate with MICC management to obtain better meal and activity schedules, and to eliminate harassment of residents by prisoners; and
>
> (iv) [Negotiate to] acquire more adequate space within the MICC complex, e.g., by taking over all of A Unit when new space is needed, with yard space adjacent thereto.

This requirement corresponds to item B of the original injunction, which required SCC to implement strategies to rectify the lack of trust and rapport between residents and treatment providers. The fifteenth report of the special master identified steps needed in regard to this part of the injunction: (1) install a system to allow outgoing calls; (2) negotiate with MICC management to improve conditions including "big yard" access and appropriate segregation conditions; and (3) provide a complete facility planning document (showing each step from now until the new facility

is constructed, including population estimates, data on space per resident, an end date for "temporary" overcrowding, and a proposal for separating groups).

A separate treatment-oriented facility is in the planning stages and is expected to be funded by the next legislature, which will convene in January 2000. Given the population growth, such a facility is vital to the SCC's future success and legality. The present population is 95, and the superintendent estimates 115 by the end of this year, with major increases to follow. The tentative site for the new facility is McNeil Island at a location separate from the prison. The IOC Report, Drs. Smith and Seling, and residents' family members all recommend a more accessible location free of any proximity to a prison. The evidence shows that the advantages expected in the April 1998 move from Monroe to McNeil Island (more ample space, use of an infirmary on the island, increased recreational and vocational opportunities, availability of resources at Western State Hospital (which is nearby on the mainland), and an improved relationship with DOC) have not materialized except for larger space with better views. To the contrary, MICC's pervasive influence has made SCC's mission more difficult than it has to be. But there is expert opinion (including the special master's opinion) that SCC can provide adequate mental health treatment at McNeil Island, both at the present location (assuming that adequate space for the growing population will be provided) and, more easily, when the new facility opens in 2002. That being so, the present record does not justify an order requiring that SCC be located elsewhere. The current need, as stated in the November 25, 1998, order, is to reduce the negative effects of the connection with MICC to the point where constitutionally adequate mental health treatment can be provided. In that regard:

Routine strip searches of residents have been eliminated in compliance with the injunction. The result is to reinstate the policy that prevailed at Monroe.

Defendants have failed to comply with the November 25 order requiring them to eliminate the bar on outgoing telephone calls (other than collect). After the program was relocated to McNeil Island, and until September 1999, residents were able to make only outgoing collect or legal calls.

Although SCC could quickly have installed business lines and implemented a system like that in Monroe, it elected not to, deferring to DOC's preference for a system requiring residents to use PIN numbers, and restricting them to making outgoing calls to five pre-approved numbers. Even this limited telephone access is not yet fully implemented. State mental hospitals do not have the restrictions on use imposed by the PIN system; at Western State, residents can go to a regular pay phone and place calls. SCC's delay in implementing the court's order has made it more costly for residents to contact family members and has had a detrimental effect on residents and their families. SCC still does not have a system that allows incoming calls to be made directly to residents to comply with a state regulation, Wash. Admin. Code § 275-155-050(2)(f).

Defendants have made substantial improvements in meal and activity schedules, and the acquisition of a separate dining room for SCC has brought more reasonable meal times, a reduction of contact between SCC residents and MICC inmates, and twenty-one work stations for employment of residents.

Defendants succeeded on October 11, 1999 – eight days before the hearing – in taking over all of A Unit for SCC, which avoids overcrowding for the moment and permits the separation of residents accepting treatment from those who harass them. This marks the most important step forward since the May 1999 hearing. The living space in A Unit, however, will become inadequate as the population grows.

Yard space is still unduly limited because of MICC's refusal to let residents use the "big yard" after routine strip searches were stopped. The requirement that defendants negotiate with MICC for more adequate yard space is not yet fully met.

Although defendants have made progress in reducing the negative effects of SCC's connection with MICC, the prison's influence remains pervasive and damaging. As one staff member testified, the atmosphere is "always on yellow." Residents are restricted in their movements by DOC schedules or emergencies, must go through DOC for medical treatment and medications, an

are shackled and dressed in prison jumpsuits when they leave the island. Defendants have not made a sufficient effort to separate SCC from DOC influence and control.

(e) To improve the treatment environment in the following respects:
(i) Use new living space to provide some separation between residents in treatment and those who have harassed treatment recipients;
(ii) Draft and implement fair and reasonable grievance procedures and behavior management plans; and
(iii) Afford reasonable opportunities to all residents for educational, religious, vocational/work, and recreational activities.

This requirement also corresponds to item B of the original injunction. The fifteenth report of the special master identified steps needed in this regard: (1) revise the grievance process to increase its resolution rate and demonstrate the credibility of the appeal process and clarify, via policy, when mediation services will be employed in grievance and other conflict situations; (2) document that the new policies have undergone a professional review (to ensure that they are consistent with each other and have clear procedures) and review by the resident advocate (to ensure that they are fair and understandable to residents); (3) expand educational, vocational and work opportunities and integrate these domains into the treatment planning process; (4) provide consistent access to religious activities for all residents; (5) assign a social worker to the living unit, with duties to include increasing social activities, family outreach, and building support networks for residents; (6) ensure that residents with disabilities have access to hobby and recreation, as well as to the law library (e.g., consider CD-ROM editions for the unit); and (7) demonstrate that management is considering and responding to the Resident Advisory Council and focus group input.

The recently-acquired living space (A Unit) now provides the needed separation of residents.

Grievance policies and processing are still too cumbersome and ineffective. Behavior management plans, and segregation in the prison's F Unit, are used too frequently to be consistent with a treatment-oriented environment.

Educational, religious, vocational/work, and recreational activities are still under-provided. A part-time Native American chaplain now is available, but defendants have failed unjustifiably to provide a sweat lodge (an area about fifteen feet square) for Native American religious purposes.

(f) To initiate and implement program oversight both by an internal review process and by an external body, either through a licensing organization or another entity.

This uncontested requirement stems from a court order of February 4, 1997, which required external oversight to guarantee that the essential program features operate in practice and not just on paper. The fifteenth report of the special master identified the steps needed: with the court's approval, fully implement the oversight package recommended by the Advisory board, including clarifying the ombudsman and investigator roles and requiring non-DSHS participation in IOC reviews.

Defendants have now satisfied this requirement. The Governing Body, the Advisory Board, and the IOC are providing external oversight. Internal oversight is provided by the ombudsman and the resident advocate.

(g) In the foregoing respects, and in others previously ordered, to take all reasonable steps to bring a constitutionally adequate program into reality rather than merely describing it on paper.

This basic requirement is still unmet, as shown by the foregoing findings and by the evidence that staff members, on too many occasions, have interacted with residents in unprofessional and damaging ways. Residential as well as clinical staff must act consistently with SCC being a civil-commitment, treatment-oriented facility.

4. In consultation with the special master, the superintendent decided following the May 1999 hearing that certain compliance goals could be met by October and the remainder by about the beginning of 2000. The most urgent attention was to be given to staff training, staff recruitment, treatment plans, measures of progress, facility plans, and oversight. The timetable has not been realized; there are shortfalls as to the goals set for October, and the superintendent in his testimony

has estimated that nearly another year – until September 2000 – will be needed before compliance is complete. With nearly a hundred men in confinement, such a long delay is unacceptable in view of the time already allowed.

5. The failures to comply with the injunction, set forth above, are failures to meet constitutionally required minimum professional standards for the treatment of sex offenders.

6. The ombudsman's role was redefined by an order, stipulated to by all parties, entered on July 23, 1999 (Dkt. # 1170 in the Turay case). Defendants now move to replace the current ombudsman, Samuel Elwonger (who was hired with their approval), with an outside private agency, and to change the ombudsman's responsibilities in certain respects. Neutrality is a requirement of the job, and Mr. Elwonger often has seemed more like a partisan than a neutral. He has shown a growing understanding of the job's requirements, however, and his knowledge of and experience with the SCC are valuable. His relations with SCC's management have improved over time. There is no justification for the direction given to some SCC staff members that they should not talk to the ombudsman during working hours. On the assumption that Mr. Elwonger can and will act with full neutrality in the future, the court will deny, without prejudice to its later renewal, defendants' motion to replace him. The proposed changes in the ombudsman's role would move him from outside to inside the SCC chain of command, jeopardizing his neutrality; the motion to make those changes is denied.

7. Bearing in mind that the test for contempt is whether the alleged contemnors have failed to take all reasonable steps within their power to comply with the injunction, findings must be made as to the causes of the failure to achieve compliance. Based on the evidence received at the October 1999 hearing, and the entire record in these cases, the court finds that the causes have been and are as follows:

(a) The State of Washington, through its DSHS (which operates the SCC) and its DOC (which operates the MICC), has failed to devote the resources necessary to achieve compliance

This is the chief cause. Instead of doing what must be done, the state has treated SCC as an unwanted stepchild of a medium-security prison. Dr. Seling, the superintendent, is dedicated to achieving a successful treatment-oriented program, but neither he nor other staff members can succeed without adequate resources. Dr. Smith, until recently the clinical director, testified that his repeated requests for adequate staffing, other resources, and more freedom from MICC were rejected on budgetary or prison security grounds; eventually, he gave up and stopped making requests. As noted in an earlier order, nothing compels a state to adopt a statute of this nature in the first place and many states have not done so (see December 23, 1998, order at 8, n.3); but a state that chooses to have such a program must make adequate mental health treatment available to those committed.

(b) The defendants have fallen into a pattern of first denying that anything is amiss at SCC, then engaging in a flurry of activity to make improvements before the next court hearing, then admitting at the hearing that shortfalls of constitutional magnitude still exist, then returning to denial. For example, Defendants' Reply Brief filed September 27, 1999, states at page 1 that "defendants believe they have long ago achieved constitutionally adequate treatment for the residents of the SCC . . . ." Yet at the October 19-21 hearing both Dr. Seling and Dr. Smith testified candidly to the contrary – Dr. Smith even used the term "dysfunctional" in describing SCC's program – and defendants now propose that the injunction be maintained at least for the next several months. Parties to litigation are entitled to deny opposing parties' claims and to appeal adverse rulings, but in these cases the entrenched resistance has impeded prompt and wholehearted compliance with court orders protecting basic liberties.

(c) The placement of SCC within the perimeter of MICC continues to make it difficult to achieve a treatment-oriented environment.[4] On issues such as routine strip searches

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[4]There is a persistent misunderstanding in DSHS as to where the SCC should be located. It is not required to be on the grounds of a prison. The error in arguing otherwise was pointed out in the December 23, 1998, order at 6-7. As made clear in that order, the law requires that SCC be a civil

(conducted against the wishes of SCC management and ended only after two court orders were entered), outgoing telephone calls (still a bone of contention), and the use of the "big yard" (unavailable to SCC residents because of prison security concerns), MICC continues to have adverse effects upon SCC. The IOC Report states: "The site at present definitely operates more like a correctional facility than a treatment center or program." Plaintiffs' Ex. 1 at 5. As the special master testified, compliance at this location, although difficult, is possible if the necessary effort is made; so far, the full effort has not been made.

(d) After three years of service, Dr. Robert Smith resigned as clinical director in August 1999. His departure followed a long period of discord with Dr. Seling, of which the court was informed only at the October 19-21 hearing. Dr. Smith is a qualified expert in the treatment of sex offenders. The unproductive dispute between the two highest SCC officials, and Dr. Smith's resignation, have hampered the SCC program. Fortunately, Dr. Vincent Gollogly, serving as acting clinical director despite a shortage of credentials as an expert in sex offender treatment, appears to have done an excellent job to date. The evidence supports the resident advocate's report that "Dr. Gollogly has assumed a dynamic and positive role in clinical leadership." Defendants' Ex. A-2 at 1. The search for a permanent clinical director is under way but needs to be expedited.

(e) The task is inherently difficult. The statute, although constitutional on its face under Kansas v. Hendricks, 521 U.S. 346 (1997), in practice causes resentment and resistance because it re-confines, for an indefinite period, offenders who have served their sentences and have been released. Successful treatment of sex offenders is no easy task even among those who voluntarily seek it; it is harder yet, by and large, among those involuntarily committed. But the

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commitment facility, not a prison, and be operated by the DSHS, not by the DOC. But the error has surfaced again in the October 17, 1999, Draft Space Program Report of DSHS's consulting firm for the planned new facility, which says at section 2, page 1: "RCW 71.09, through WAC 275-155010, provides that the Special Commitment Center must be located at a secure Department of Corrections operated facility . . . ."

difficulties have been recognized fully in the generous time already allowed for compliance, and at this point, on this record, do not excuse a further failure to perform.

8. The record in these cases shows footdragging which has continued for an unconscionable time. The court finds by clear and convincing evidence that the defendants have not taken all reasonable steps within their power to comply with the injunction, and have intentionally disregarded the injunction's requirements. Although this conduct does not represent the choice of Drs. Seling and Gollogly, it must be attributed to them as the defendants herein.

9. Compliance should have been complete long ago. The time now estimated by the SCC superintendent to achieve it – September 2000 – is unnecessarily long and would unnecessarily harm the residents. There appears to be no reason why compliance could not be complete in six months following the recent hearing, i.e., by April 2000.

III. CONCLUSIONS OF LAW

1. The court has jurisdiction herein pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

2. The Washington statute involved here, RCW ch. 71.09, is a civil commitment statute. A sex offender, typically one who has served his prison term or is about to complete his sentence, may be detained and committed under it for an indefinite time. The term "sexually violent predator" is defined as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(1). If a committed person petitions for discharge from confinement, the central question is whether his mental abnormality or personality disorder has so changed that he is no longer likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged. RCW 71.09.090(1).

3. The Fourteenth Amendment Due Process Clause of the United States Constitution requires state officials to provide civilly-committed persons, such as these plaintiffs, with access to

mental health treatment that gives them a realistic opportunity to be cured or to improve the mental condition for which they were confined. See Youngberg, 457 U.S. at 319-22; Ohlinger, 652 F.2d at 778. Moreover, defendants have a duty to provide plaintiffs with "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." Youngberg, 457 U.S. at 322. Recognizing these requirements, the Washington statute provides that "[a]ny person committed pursuant to this chapter has the right to adequate care and individualized treatment." RCW 71.09.080(2).

4. The state, however, "enjoy[s] wide latitude in developing treatment regimens [for sex offenders]," Hendricks, 521 U.S. at 368 n.4, and "liability [on a claim of constitutional deprivation] may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Youngberg, 457 U.S. at 323 (1982).

5. As set out in the foregoing findings of fact and in earlier orders, the defendants persistently have failed to make constitutionally adequate mental health treatment available to the SCC residents, and have departed so substantially from professional minimum standards as to demonstrate that their decisions and practices were not and are not based on their professional judgment.

6. Injunctive measures ordered against a state agency or official ordinarily must be no broader than necessary to remedy the constitutional violation, but a remedy may go beyond the precise terms of the specific violation "when there is a record of past constitutional violations and violations of past court orders." Gary v. Hegstrom, 831 F.2d 1430, 1433 (9th Cir. 1987) (citing Hoptowit v. Ray, 682 F.2d 1237, 1247 (9th Cir. 1982)). The court may "order relief that the Constitution would not of its own force initially require if such relief is necessary to remedy constitutional violations." Gluth v. Kangas, 951 F.2d 1504, 1510 n.4 (9th Cir. 1991) (citing Toussain v. McCarthy, 801 F.2d 1080, 1087 (9th Cir. 1986)). The orders of November 25 and December 23,

1998, and May 27, 1999, listed specific steps to be taken that were within the scope of the injunction as originally issued.

7. In the respects set forth in the findings of fact, defendants have continued to violate the injunction herein and the implementing orders of November 25 and December 23, 1998.

8. The test for determining contempt is "whether the defendants have performed 'all reasonable steps within their power to insure compliance'" with the order. Stone v. City of San Francisco, 968 F.2d 850, 856 (9th Cir. 1992). The contempt "need not be willful." In re Crystal Palace Gambling Hall, Inc., 817 F.2d 1361, 1365 (9th Cir. 1987). "[T]here is no good faith exception to the requirement of obedience to a court order." See Peterson v. Highland Music, Inc., 140 F.3d 1313, 1323 (9th Cir. 1998). The party alleging civil contempt must demonstrate by clear and convincing evidence that parties to be held in contempt violated the court's order. Federal Trade Comm'n v. Affordable Media, LLC, 179 F.3d 1228, 1239 (9th Cir. 1999). The burden then shifts to the alleged contemnors to demonstrate why they were unable to comply. Id. A party's inability to comply with a court's order constitutes a defense to a charge of civil contempt. Id.

9. The record shows by clear and convincing evidence that defendants have failed to take all reasonable steps within their power to comply or substantially comply with the injunction, and have intentionally disregarded the injunction's requirements. There is no showing that the defendants are or have been unable to comply. Accordingly, the defendants are now held to be in contempt of court.

10. The purpose of civil contempt sometimes is not to punish but "to coerce the defendant into compliance with the court's order, and to compensate the complainant for the losses sustained." Whittaker Corp. v. Execuair Corp., 953 F.2d 510, 517 (9th Cir. 1992); see also International Union, United Mineworkers of America v. Bagwell, 512 U.S. 821, 829 (1994). While the court must use the "least possible power adequate to the end proposed," Spallone v. United States, 493 U.S. 265, 276 (1990), it also "must consider the character and magnitude of the harm threatened by continued

contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." Whittaker, 953 F.2d at 516. Defendants' footdragging is an important factor in weighing the use of a contempt sanction. See Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC, 478 U.S. 421, 476-77 (1986) (upholding affirmative action plan and fine imposed by the district court and stating that "[i]n light of petitioners' long history of 'foot dragging resistance' to court orders, simply enjoining them from once again engaging in discriminatory practices would clearly have been futile.").

11. The present injunction is five and one-half years old and the defendants have been given repeated opportunities to comply without sanctions being imposed. It is now clear that sanctions are essential. The primary sanction requested by plaintiffs – that all SCC residents be ordered released – is not justified at this point as a measure to induce compliance. It is therefore not necessary to decide whether release could be ordered in a civil rights case such as this as distinguished from a habeas corpus case. See, e.g., Heck v. Humphrey, 512 U.S. 477 (1994); Preiser v. Rodriguez, 411 U.S. 475 (1973). Financial sanctions should be sufficient, and, in view of defendants' recent belated efforts to improve the SCC's treatment practices and environment, should be deferred for six months from the time of the last hearing to afford a final opportunity to comply.

12. A sanction for "[c]ivil contempt is characterized by the court's desire to compel obedience to a court order or to compensate the contemnor's adversary for the injuries which result from the noncompliance." Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 778 (9th Cir. 1983). The amount of a compensory contempt fine is in the discretion of the court. United States v. Asay, 614 F.2d 655, 660 (9th Cir. 1980). The appropriate sanction here is a payment of $50 per day per resident confined on that day (which, with about 100 residents, would equal roughly $5000 per day), to be paid into the registry of this court for subsequent disbursement, pursuant to court order, to the residents or for their benefit. For the sanction to be effective, the parties must be assured that it will not be nullified by a state claim for the cost of each resident's custody. The state has used a

threat of such recoupment as a means of discouraging damages claims by residents. See Plaintiffs' Ex. 14. Therefore, the sanction payments will not be subject to a lien or claim by the state for costs of confinement, evaluation, or care pursuant to RCW 71.09.110, Wash. Admin. Code § 275-155-060, or any other statute or regulation. The sanction amount will be due for each day commencing May 1, 2000, unless the court sooner determines that injunction compliance is complete or substantially complete, and will be paid monthly, for the preceding month, beginning on June 15, 2000, and on the fifteenth of each month thereafter until the sanction is removed.

13. This order will not preclude the imposition of other sanctions should defendants continue to violate the injunction.

IV. ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is ordered that:

1. Plaintiffs' motion for a finding of contempt of court and for the imposition of sanctions is granted. Defendants are held to be in contempt of court for having failed to take all reasonable steps within their power to comply with the injunction herein by making constitutionally adequate mental health treatment available to the SCC residents.

2. A civil contempt sanction is hereby imposed as follows: Defendants shall pay into the registry of this court a sanction of $50 per day per resident confined at the SCC on that day, which amount will be due for each day commencing May 1, 2000, unless the court sooner determines that injunction compliance is complete or substantially complete. The sanction will be paid monthly, for the preceding month, beginning on June 15, 2000, and on the fifteenth of each month thereafter until the sanction is removed. The sanction proceeds will be disbursed, pursuant to court order, to the residents or for their benefit, and will not be subject to a lien or claim by the state for the costs of confinement, evaluation, or care pursuant to RCW 71.09.110, Wash. Admin. Code § 275-155-060, or any other statute or regulation.

3. Plaintiffs' separate motion for a finding of contempt as to the changes required in the SCC telephone system is granted. This being an item of injunction compliance within the scope of paragraphs 1 and 2, above, no separate sanction will be ordered.

4. Defendants' motion to replace the ombudsman is denied without prejudice to its renewal in the event of any future demonstrated lack of neutrality on the ombudsman's part, or for other cause.

5. Defendants again are enjoined to comply fully with the injunction herein, as detailed in the orders entered on November 25 and December 23, 1998, and in doing so to use the assistance provided by the special master.

6. A further report by the special master will be due on April 12, 2000. A hearing as to injunction compliance will be held at 8:45 a.m. on April 18, 2000. Any party may move for contempt, dissolution of the injunction, or other relief before the scheduled hearing.

The clerk is directed to send copies of this order to all counsel of record, the pro se plaintiffs, amici curiae, and the special master.

Dated: November 15, 1999.

William L. Dwyer
United States District Judge

APPENDIX C

At the oral argument in the Ninth Circuit, Assistant Attorney General Sarah Sappington had the following exchange with the Court:

CT: Can I ask you a question? If it turns out that the state was placing the Section 71.09 confinee in prison with the general prison population In other words, you're confined under 71.09 and we're putting you at McNeil, and no treatment. Would you argue that 71.09 is a civil commitment statute?

Ms. Sappington: If the statute provided for exactly that --

CT: No, no, no. You have to listen to me. You know, if it turns out that the state was placing 71.09 confinees --

Ms. Sappington: Okay --

CT: -- in the prison with the general prison population, with no treatment at all, would 71.09 still be a civil commitment statute?

Ms. Sappington: And this is being done in violation of the direct terms of the statute --

CT: No, just answer my question. It's self-contained.

Ms. Sappington: Okay. I'm assuming then that the Court is asking me if this were being done in violation of the expressed terms of the statute would the state be still arguing that it's a civil commitment statute?

CT: No, I'm not. I'm saying if the state took 71.09 confinees. All right?

Ms. Sappington: Yeah.

CT: Put 'em in McNeil --

Ms. Sappington: Right --

CT: -- no treatment --

Ms. Sappington: Right --

CT: They're with the general prison population. Would you argue then that 71.09 is a civil commitment statute?

Ms. Sappington: If that were being done in violation of the express terms of the statute --

CT: Can you answer it yes or no? I'm waiting. What did we used to do in traffic court? You know, you'd plead guilty with an explanation. So, answer yes or no, and then explain. _____

Ms. Sappington: Yes, the state would still argue that that was a civil commitment statute if it were being done in violation of the statute. If the statute provided for putting all these people together and no treatment, then it wouldn't be a civil commitment statute.

CT: No, I'm not saying the statute provides it.

Ms. Sappington: Okay.

CT: I'm saying if it turned out that you're a 71.09 confinee --

Ms. Sappington: Um hmm--

CT: -- all right, and we put you in the general prison population, we don't give you any treatment. Would you then argue that 71.09 was a civil commitment statute?

Ms. Sappington: Believe me, I understand the Court's frustration with me, but my, the frustration stems from the fact that it is the state's position that whether something is a civil commitment statute or not is defined by what the statute requires.

CT: Without any regard to the question of ~~it~~ it is applied as to this Appellant?

Ms. Sappington: In turn --

CT: That is your position?

Ms. Sappington: Yes, that is my position. This his remedy

CT: Is that not categorically your position?

Ms. Sappington: That is categorically my position.

Excerpt of Oral Argument in the Ninth Circuit, as transcribed from a tape recording by Defender Association staff.

Appendix E

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In re the Detention of ANDRE BRIGHAM YOUNG, Respondent.	NO. PETITION 90-2-21319 6

I, Norm Maleng, Prosecuting Attorney for King County, in the name and by the authority of the State of Washington, do allege that respondent Andre Brigham Young is a sexually violent predator, given the following:

Respondent Young has been convicted in King County, Washington, of a sexually violent offense, to wit: Rape in the First Degree, defined in RCW 9A.44.040, and his sentence on that conviction is about to expire on October 25, 1990. Furthermore, respondent suffers from a mental abnormality or personality disorder which makes him likely to engage in acts of sexual violence directed toward strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization;

Therefore, pursuant to § 1001-1013 of Chapter 3, Laws of 1990, respondent should be committed to the custody of the Department of Social and Health Services in a secure facility for control, care, and treatment until such time as his mental abnormality or personality disorder has so changed that he is safe to be at large.

NORM MALENG
King County Prosecuting Attorney

Tim M. Blood
TIMOTHY M. BLOOD WSBA ID #91002
Deputy Prosecuting Attorney

PETITION - 1
916-SIIA.PD

Norm Maleng
Prosecuting Attorney
W 554 King County Courthouse
Seattle, Washington 98104-2312
(206) 296-9000

ATTACHMENT (A)

INSTRUCTION NO. 8

To find that the respondent, Andre Brigham Young, is a sexually violent predator, each of the following elements must be proved beyond a reasonable doubt:

(1) That the respondent has been convicted of a crime of sexual violence: specifically, of an act defined in Title 9A RCW as rape in the first degree;

(2) That the respondent suffers from a mental abnormality or personality disorder; and

(3) That such mental abnormality or personality disorder makes the respondent likely to engage in predatory acts of sexual violence.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that the respondent is a sexually violent predator.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one or more of these elements, then it will be your duty to return a verdict that the respondent is not a sexually violent predator.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JERRY ROBERT SHARP, DOB: 10/7/51 Defendant.	NO. 92 1 00253 5 DECLARATION OF SARAH B. SAPPINGTON

SARAH B. SAPPINGTON declares as follows:

1. I am an Assistant Attorney General with the Office of the Attorney General for the State of Washington. I am the head of the office's Civil Commitment Sexually Violent Predator (CCSVP) Unit. I am familiar with the files and records of the proceeding which this office filed against Jerry Sharp, Benton County cause no. 93-6-00087-3, as well as the filing standards and practices of this office, and am qualified to testify regarding these matters.

2. The CCSVP Unit was established in 1990 after the passage of the Sexually Violent Predator statute (hereinafter, "the Statute"). RCW 71.09.010 et. seq. Pursuant to RCW 71.09.030, the Attorney General's Office is authorized, at the request of the county prosecutor, to file petitions alleging that an individual is a sexually violent predator. Since its establishment, the CCSVP Unit has handled all litigation relating to the Statute for

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all of the counties of Washington State, with the exception of Snohomish, Pierce and King.

3. On September 30, 1993, the Attorney General's Office, at the request of the Benton County Prosecuting Attorney, filed a petition alleging that Jerry Sharp is a sexually violent predator. A true and accurate copy of that petition is attached hereto and incorporated herein by reference as Exhibit A.

4. Since his initial detention, Mr. Sharp has remained in the custody of the Department of Social & Health Services at the Special Commitment Center in Monroe, Washington.[1]

5. Pursuant to RCW 71.09.020(1), a sexually violent predator is defined as "any person who has been convicted or charged with a crime of sexual violence and who suffers from a mental abnormality of personality disorder which makes the person likely to engage in predatory acts of sexual violence." Sexually violent offenses are explicitly defined by statute. RCW 71.09.020(4). Despite a history of sexual misconduct over the last 25 years, only the convictions for Attempted Kidnapping and Unlawful Imprisonment constitute sexually violent offenses pursuant to the Statute. Accordingly, upon issuance of the Mandate from the Court of Appeals following its reversal of Mr. Sharp's conviction for these crimes, the State was required by law to dismiss its

[1]Although entitled by statute to a trial on the State's petition within 45 days, Mr. Sharp has repeatedly waived this right in order to first obtain a determination from the Court of Appeals on his conviction for Attempted Kidnapping in the Second Degree and Unlawful Imprisonment.

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petition. The order dismissing the petition was signed by the Honorable Carolyn Brown on March 26, 1996.

6. If Mr. Sharp is once again convicted of Attempted Kidnapping and Unlawful Imprisonment, the State fully intends to refile its petition alleging that Jerry Sharp is a sexually violent predator.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28 day of March, 1996, at Seattle, Washington.

SARAH B. SAPPINGTON

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Appendix G

003 389

BENTON COUNTY
OFFICE OF COUNTY CLERK AND
CLERK OF SUPERIOR COURT
FILED
MAR 26 1996
E. KAY BALCH, Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON COUNTY

In re the Detention of: JERRY ROBERT SHARP, Respondent.	NO. 93 2 01177 3 ORDER ON RESPONDENT'S MOTION TO DISMISS

THIS MATTER having come before the undersigned Court on Respondent's Motion to Dismiss on March 25th, 1996, the Respondent being represented by his attorney, Gary C. Hugill, the Petitioner appearing telephonically through Sarah B. Sappington, Assistant Attorney General; the Court having considered the briefs submitted by counsel and having heard argument, now, therefore, enters the following:

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COPY

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ORDER

Based on the mandate issued by the Court of Appeals in State v. Sharp, no. 12784-2-III, issued on March 22, 1996, this Court no longer has jurisdiction over Respondent. Accordingly, the Petition filed in this cause on September 29, 1993, is hereby **DISMISSED**.

DATED this 25th day of March, 1996.

JUDGE CAROLYN A. BROWN

Presented by:

CHRISTINE O. GREGOIRE
Attorney General

SARAH B. SAPPINGTON, WSBA #14514
Assistant Attorney General
Attorney for Petitioner

Copy received; Approved as to Form;
Notice of Presentation Waived:

GARY C. HUGILL, WSBA #4713
Attorney for Respondent

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Supreme Court, U.S.
FILED
FEB 23 2001
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(4)

NO. 99-1185

IN THE
SUPREME COURT OF THE UNITED STATES

MARK SELING, Superintendent,
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

CHRISTINE O. GREGOIRE
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State of Washington

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Counsel for Petitioner

12pp

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1. Introduction

This case concerns Washington's Sexually Violent Predator Statute (Statute), Wash. Rev. Code 71.09, which provides for the civil commitment and treatment of sexually violent predators. The Washington law is substantially similar to the Kansas law upheld by this Court in *Kansas v. Hendricks*, 521 U.S. 346 (1997). The court of appeals ruled that the Statute did not violate Young's right to substantive due process or equal protection. *Young v. Weston*, 192 F.3d 870, 876 (9th Cir. 1999); Pet. App. at 12a.[1]

The Ninth Circuit also recognized that "*Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses". *Id.* at 874; Pet. App. at 7a. However, the Ninth Circuit concluded that an otherwise valid civil statute can be divested of its civil nature and be held to violate the *ex post facto* and double jeopardy clauses, if the commitment facility fails to provide for treatment and other conditions of confinement required by the Statute. This case presents an important question of law that requires resolution by this Court.

2. The Ninth Circuit's Decision Directly Conflicts With A Decision Of The Washington Supreme Court

The Washington Supreme Court, in *In re the Detention of Turay*, 139 Wash. 2d 379, 986 P.2d 790, 810-12 (1999), expressly rejected the Ninth Circuit's decision in this

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[1] Young's substantive due process and equal protection claims were facial challenges to the Statute. Young did not file a cross petition for certiorari. An argument that would modify the judgment cannot be presented unless a cross petition has been filed. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985). Here, the judgment of the Ninth Circuit granted Young an evidentiary hearing related to his *ex post facto* and double jeopardy claims. *Young*, 192 F.3d at 876; Pet. App. at 13a. An argument that would invalidate the Statute, on its face, without the need of an evidentiary hearing modifies the court's judgment. Accordingly, these issues are not before the Court.

case, concluding that its analysis was flawed. According to the Washington Supreme Court, to determine if a statute is civil or criminal "a court must look at the statute on its face". *In re Turay*, 986 P.2d at 811. The Washington Supreme Court rejected the Ninth Circuit's conclusion that the civil or criminal nature of a statute can be determined by examining the actual conditions of confinement. *Id.* at 812.

Young seeks to minimize this conflict in two ways. First, Young claims that the Washington Supreme Court reviewed conditions of confinement in *In re the Detention of Campbell*, 139 Wash. 2d 341, 986 P.2d 771 (1999). Br. Opp'n at 27-28. This is incorrect. *In re Campbell* also held that the civil or criminal nature of the statute must be determined on the face of the statute. The court in *In re Campbell* stated:

> "We have held, in order to evaluate a statute's constitutionality, *a court's task is to look at the statute on its face, not whether it is adequately applied. Winchester v. Stein*, 135 [Wash.] 2d 835, 959 P.2d 1077 (1998). *Winchester* expressly noted that 'the *focus . . . is on the sanction allowed by the statute, not the actual sanction imposed in a particular case*.' *Winchester*, 135 [Wash.] 2d at 847." *In re Campbell*, 986 P.2d at 775 (emphasis added).

The *In re Campbell* court went on to reiterate the principle that:

> "'A legislature's designation of a penalty as civil is entitled to considerable deference and that designation will not be overborne *unless the statute, considered on its face and without reference to the level of sanction imposed in the particular case*, is clearly so punitive as to render it criminal despite the legislature's intent to the contrary.' *Winchester*, 135 [Wash.] 2d at 853 (emphasis added)." *In re Campbell*, 986 P.2d 775.

The only reference to conditions of confinement was based on the assumption that it was proper to consider conditions of confinement. The court said:

> "*Even assuming* Campbell may properly challenge the validity of his order of commitment based upon the conditions of confinement at the SCC, *but see In re Detention of Turay*, 139 [Wash.] 2d 379, 413-20, 986 P.2d 790 (1999) (conditions of confinement do not implicate legality of commitment order), Campbell has failed to prove the conditions of confinement are punitive, so as to render the statute unconstitutional as applied to him." *Id.* at 775 (emphasis added).

Thus, the Ninth Circuit's decision conflicts with both *In re Turay* and *In re Campbell*. In both decisions the Washington Supreme Court rejects the Ninth Circuit's view that the civil nature of a statute is to be determined by examining the actual conditions of confinement.

Young's second argument is that the conflict between the Washington Supreme Court and the Ninth Circuit involves nothing more than a dispute over whether to hold an evidentiary hearing. Br. Opp'n at 27. This argument mischaracterizes the issue in this case. The conflict centers on an important principle of constitutional analysis. How does a court determine whether a law is civil or criminal for

purposes of the *ex post facto* and double jeopardy clauses? This is a purely legal question that requires resolution by this Court.[2]

3. The Conflict In This Case Is Important And Requires Resolution By This Court

The conflict between the Washington Supreme Court and the Ninth Circuit is clear. It is an important conflict that requires resolution. The conflict is important for two reasons. First, the law in Washington State is uncertain. State courts, bound by the decision of the Washington Supreme Court in *In re Turay* and *Young*, analyze the Statute one way. Federal courts, bound by the decision of the Ninth Circuit, analyze the Statue another way. This uncertainty can only be resolved by a decision of this Court.

Second, the question presented in this case is important because of uncertainty over the meaning of two of this Court's decisions—*Hendricks* and *Hudson v. United States*, 522 U.S. 93 (1997). Young argues at length that the Ninth Circuit's decision is correct. Young claims that the majority in *Hendricks* looked not only at the language of the statute but also the actual conditions of confinement. Br. Opp'n at 7-9. Young also argues that *Hudson's*

[2] Young notes that the State has not argued that conditions at the special commitment center are not punitive. Br. Opp'n at 6. We have not discussed conditions at the center because they are not relevant to the legal issue presented in this case. The Appendix to Young's brief contains two orders from another proceeding, *Turay v. Seling*, U.S.D.C. W.D. Wash., No. C91-664WD, which has been consolidated with other cases. Br. Opp'n App. A, B. These orders are the result of an action under 42 U.S.C. § 1983 over conditions of confinement at the special commitment center. A jury found for the state on all issues except failure to provide adequate mental health treatment, and the district court entered an injunction to improve the mental health treatment. Br. Opp'n App. A-1. The state has appealed the orders issued in 1988 (not included in Young's appendix) and 1999 (included as Appendix B). *Sharp v. Seling*, 9th Cir., No. 99-35015; *Turay v. Weston*, 9th Cir., No. 99-35202; *Sharp v. Seling*, 9th Cir., No. 00-35092.

command that the civil or criminal nature of a law must be determined on the face of the law does not apply when confinement is involved. Br. Opp'n at 10-15.[3]

Far from demonstrating the absence of any conflict, Young's arguments illustrate the dramatically different interpretations to which *Hendricks* and *Hudson* are subject. Only this Court can clarify the meaning of these two important decisions.

4. The Ninth Circuit's Decision Conflicts With *Hendricks* Because In Washington, As In Kansas, A Prior Conviction Is Only Used For An Evidentiary Purpose

In the petition, we argued that the Ninth Circuit's decision conflicts with *Hendricks* because this Court held that the *ex post facto* and double jeopardy clauses were not violated. This is because a prior conviction was only evidence to prove dangerousness and the presence of the requisite mental condition. Pet. at 20-23. Young argues that the Washington law is different from the Kansas law and that a prior conviction is an element to be proven at the commitment hearing. Br. Opp'n at 24-27.

This argument is not well taken. In fact, on this point the Washington law and the Kansas law are identical. The Kansas law in *Hendricks* defined a "sexually violent predator" as "*any person who has been convicted of or*

[3] Young also argues that courts have always considered the application of a statute in such diverse contexts as equal protection, establishment of religion, and the takings clause of the Fifth Amendment. Br. Opp'n at 16-20. However, the question here is whether a law is civil or criminal. Conditions of confinement can be challenged, but not for the purpose of determining the civil nature of a law. As the Washington Supreme Court observed in *In re Campbell*, "the State correctly notes that 'Campbell's argument confuses the issue of a committed individual's due process rights following a valid commitment under the Statute with the analysis of whether the Statute's scheme for involuntary commitment is constitutional.' Br. of Resp't at 21." *In re Campbell*, 986 P.2d at 774.

charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence. § 59-29a02(a)." *Hendricks*, 521 U.S. at 352 (emphasis added).

Washington's law applies the same definition. Wash. Rev. Code § 71.09.020(1) (1990) provides that "sexually violent predator" means "*any person who has been convicted of or charged with a crime of sexual violence* and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence". (Emphasis added); Pet. App. at 104a.[4]

The Washington and Kansas laws operate exactly the same way: Conviction of a prior crime is required because such conviction or charge provides the best proof of both dangerousness and the presence of the requisite mental condition. Young's argument fails because the Washington and Kansas laws have identical requirements.

5. Young's Substantive Due Process Claim Does Not Provide A Basis For Denying The Petition

If there is no violation of the *ex post facto* and double jeopardy clauses, Young suggests that substantive due process provides an alternate basis to support the Ninth Circuit's judgment that he is entitled to an evidentiary hearing on the conditions of confinement at the special commitment center. Br. Opp'n at 28-29.[5] Young's

[4] In 1995, the definition of "sexually violent predator" was amended to add the words "if not confined in a secure facility" to the end of the definition. Wash. Rev. Code § 71.09.020(1) (1998) now provides that "sexually violent predator" means "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility". Pet. App. at 114a.

[5] It is not clear that Young raised this alternative argument in the district court or the court of appeals. When Young argued the *ex post facto* and double jeopardy clauses he also mentioned substantive due process. However, he did not argue that there was a substantive due process violation, based on the conditions of confinement, if there was no violation of the *ex post facto* and double jeopardy clauses. Neither the district court nor the court of appeals ruled on this claim or even mentioned it in their analysis of Young's substantive due process claims. Pet. App. at 12a, 18a-20a.

alternative argument is not an independent state ground to uphold the Ninth Circuit's decision and does not provide a basis for denying the petition.

The Ninth Circuit has ruled that the Statute does not, on its face, violate substantive due process and equal protection. *Young*, 192 F.3d at 876; Pet. App. at 12a. Young does not seek review of these rulings. If there is no violation of the *ex post facto* and double jeopardy clauses, Young has been properly committed under a valid civil statute. His alternative argument is that a person who has been properly committed is entitled to be released based on the conditions of confinement that violate substantive due process. Neither *Zinermon v. Burch*, 494 U.S. 113 (1990), nor *Reno v. Flores*, 507 U.S. 292 (1993), cited by Young, stand for this proposition.

The Court has ruled that a person who has been committed may be entitled to damages or injunctive relief if conditions of confinement violate substantive due process. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982). However, it is by no means clear that such a claim may be raised in a habeas corpus petition. As this Court observed in *Bell v. Wolfish*, 441 U.S. 520, 527 n.6 (1979): "Thus, we leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself. *See Preiser v. Rodriguez*, 411 U.S. 475, 499-500 (1973)."

6. Conclusion

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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IN THE
Supreme Court of the United States

MARK SELING, Superintendent
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI* STATES IN SUPPORT OF WASHINGTON

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INTERESTS OF THE *AMICI* CURIAE

The *Amici* States submit this brief in support of Petitioner, Washington, which is seeking review of the Ninth Circuit's decision that Washington's Sexually Violent Predator Act may be challenged through an "as applied" approach for double jeopardy and *ex post facto* purposes. *See Young v. Weston*, 176 F.3d 1196, *amended by*, 192 F.3d 870 (9th Cir. 1999).

Kansas, as well as other *Amici* States, have virtually identical statutes which involve the commitment of sexually violent predators. In a direct challenge to the validity of this type of law, this Court has already held that Kansas' sexually violent predator act violated neither the double jeopardy nor *ex post facto* clauses of the United States Constitution. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

Instead of deferring to this Court's decision in *Hendricks*, the Ninth Circuit ignored this Court's reasoning and improvidently created an "as applied" approach for double jeopardy and *ex post facto* analysis. The Ninth Circuit's decision flies in the face of this Court's reasoned and well established analysis in *Hendricks* as well as in *Hudson v. United States*, 522 U.S. 93 (1997).

In addition to Kansas and Washington, fourteen other states currently have a sexually violent predator act in place.[1] All these States therefore have a shared interest in preserving the integrity of these acts. Moreover, the impact of the Ninth Circuit's decision in *Young* will not only adversely affect the

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[1] Those states are: Arizona (Ariz. Rev. Stat. §§ 36-3701 — 36-3716), California (Cal. Welf. & Inst. Code § 6600), Florida (Fla. Stat. Ann. §§ 394.910-394.929), Illinois (725 Ill. Comp. Stat. Ann. 207), Iowa (Iowa Code § 229A), Massachusetts (Mass. Gen. Laws ch. 6, §§ 178C-178P), Minnesota (Minn. Stat. § 253B.185 & 253B.02, subds. 18b & 18c), Missouri (Mo. Rev. Stat. § 632.480 - 632.513), New Jersey (N.J. Rev. Stat. § 30:4-27.26), North Dakota (N.D. Cent. Code § 25-03.3), South Carolina (S.C. Code Ann. § 44-48-10), Texas (Tex. Health & Safety Code Ann. § 841), Virginia (Va. Code Ann. § 37.1-70 (1950), as amended and Wisconsin (Wis. Stat. ch. 980).

existing sexually violent predator acts around the country, but may hinder or discourage those states which may be considering similar legislation from going forward. It is further possible that the Ninth Circuit's decision will yield negative ramifications in the arena of traditional involuntary civil commitments, which would directly impact all states.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN BOTH *KANSAS v. HENDRICKS* AND *HUDSON v. UNITED STATES*.

Given the concerns over a "wide variety of novel double jeopardy claims" that arose following *United States v. Halper*, 490 U.S. 435 (1989), this Court, in *Hudson v. United States*, 522 U.S. 93 (1997), revisited the issue of whether a particular sanction should be deemed criminal or civil for double jeopardy purposes. *Hudson*, 522 U.S. at 98. In the instant matter, the Ninth Circuit has substantiated a novel double jeopardy claim in establishing that an "as applied" analysis of Washington's Sexually Violent Predator law may in turn invalidate that law pursuant to the *ex post facto* and double jeopardy clauses of the United States Constitution. *Young v. Weston*, 192 F.3d 870 (9th Cir. 1999). This decision by the Ninth Circuit should not go unchecked as it runs counter to this Court's explicit instruction in *Hudson* that a statute's effect is to be considered in relation to the statute "on its face." 522 U.S. at 100. Furthermore, the Ninth Circuit's decision misapplies the Court's reasoning in *Kansas v. Hendricks*, 521 U.S. 346 (1997) when it relied on particular language out of that decision to create an entirely impracticable "as applied" approach to double jeopardy and *ex post facto* analysis.

In *Hudson*, as well as *Hendricks*, this Court fully articulated the proper analysis to determine whether a

particular governmental sanction implicates the Double Jeopardy Clause. Initially, a court questions whether the legislature "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." 522 U.S. at 99 (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)). If the law purports to be civil on its face a presumption arises that the statute is civil. *See Hendricks*, 521 U.S. at 361. The presumption can be overcome only if the challenging party demonstrates "by the clearest proof" that the statutory scheme is "so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 99-100 (internal citations omitted). To that end, the factors enunciated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) "provide useful guideposts." *Hudson*, 522 U.S. at 99. However, this Court made it abundantly clear that the *Kennedy* factors "must be considered in relation to the statute on its face." *Id.* at 100. It is from this latter, and highly significant, point that the Ninth Circuit has deviated.

In holding that the conditions of respondent's confinement may render Washington's statute punitive as applied to him, the Ninth Circuit has fashioned a decision where one may challenge civil commitment laws based solely on the conditions of his confinement, thus rendering meaningless this Court's requirement that such challenges be considered "in relation to the statute on its face." *Id.* at 100. This constitutes a marked detour from well established Supreme Court precedent.[2]

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[2] Equally flawed was the lower court's decision to address respondent's claims under 28 U.S.C. § 2254. Given that respondent's argument centers solely on the conditions of his confinement, the appropriate remedy for respondent's claim is found in 42 U.S.C. § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475, 484-86 (1973). Respondent's appeal does not imply the invalidity of his commitment as a sexual predator because he is simply contesting the conditions of his confinement. *See Heck v. Humphrey*, 512 U.S. 477, 487 (1994); *Edwards v. Balisok*, 520 U.S. 641,

The Ninth Circuit relies primarily on this Court's decision in *Hendricks* for the position that an "as applied" analysis is appropriate for double jeopardy and *ex post facto* purposes. As a basis for this conclusion, that Court pointed specifically to the fact that both the majority and concurring opinions in *Hendricks* "turn repeatedly to the question whether the conditions of Hendricks's confinement rendered the Kansas statute punitive." *Young*, 192 F.3d 874. Consequently, the Ninth Circuit attributes a great deal of significance to the actual conditions that respondent lives under, thus establishing a separate, and misdirected, review of a state's law for double jeopardy and *ex post facto* purposes. The Ninth Circuit simply failed to appreciate the context within which this Court reviewed Hendricks's conditions of confinement. Though conditions were addressed in the decision, such a discussion was simply part and parcel of a facial analysis of the Kansas statute. The intent of the legislative body was clearly the overriding concern. *Hendricks*, 521 U.S. 362-369. In particular, this Court maintained that the "effect" of the statutory scheme is reviewed simply to determine whether a rejection of the "legislature's manifest *intent*" to deem a law civil is warranted. *Id.* at 361 (emphasis added). It follows therefore that a challenge to one's conditions may not be addressed outside of a facial analysis given that such conditions are addressed within the context of legislative intent. The only inquiry, in accordance with both *Hendricks* and *Hudson*, is whether Washington's Sexually Violent Predator law *on its face* is so punitive that it must be considered criminal.

For all practical purposes the Ninth Circuit has carved out an exception to the proper facial analysis of a statute by attributing meaning to language within *Hendricks* that is simply not there. Contrary to the Ninth Circuit's assertion in this case,

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648 (1997). Accordingly, his claim is not cognizable under 28 U.S.C. § 2254.

Hendricks did not leave open the possibility of an "as applied" approach. Quite the opposite. *Hendricks* clearly disposes of the issue given that the only reasonable interpretation is that conditions of confinement are addressed solely within an evaluation of legislative intent. Consequently, the decision in *Young* could be summarily reversed because there is no support in this Court's precedents for an "as applied" approach to double jeopardy and *ex post facto* challenges to a statute.

Indeed, any doubt on this point was completely erased when this court overruled *United States v. Halper* as unworkable. *Hudson*, 522 U.S. at 101-102. In finding that the *Halper* decision had improperly "elevated" a single *Kennedy* factor, this Court reaffirmed the import of the *Kennedy* decision that no one factor should be considered controlling. *Id.* at 101. More importantly, however, was this Court's finding that *Halper* had, contrary to *Kennedy's* command, "assessed the character of the actual sanctions imposed." *Id.* at 101-102. This test established by *Halper*, as the Court noted, "has proved unworkable." *Id.* at 102. Unfortunately, the Ninth Circuit ignored this Court's overruling of *Halper* and has attempted to resurrect the *Halper* approach, maintaining that the validity of an "as applied" analysis is found not only in *Hendricks* but *Allen v. Illinois*, 478 U.S. 364 (1986) as well. *Young*, 192 F.3d at 874, n. 4. Neither *Hendricks* nor *Allen* provide for such analysis, as this Court made clear in *Hudson*.

In short, this Court has unequivocally announced that for double jeopardy and *ex post facto* purposes, consideration of a statute's effect is part and parcel of the analysis of the statute on its face. *Hudson*, 522 U.S. at 100. An "as applied" approach, as utilized by the Ninth Circuit in this matter, does not exist under this Court's precedents and is simply unworkable as this Court explained when it overruled *Halper*. More importantly, this Court's decision in *Hendricks* lends absolutely no support to the position that an "as applied"

approach can be fashioned apart from a facial analysis of a state's civil commitment law. *Hendricks* makes clear that assessing respondent's conditions of confinement is necessary only to determine whether the legislature's intent in passing the law was punitive, which is part of resolving a facial challenge to the statute.

II. THE NINTH CIRCUIT'S DECISION IN *YOUNG v. WESTON* POTENTIALLY IMPLICATES ALL CIVIL COMMITMENT LAWS, NOT JUST SEX PREDATOR STATUTES.

It is unquestionable that if left to stand, *Young v. Weston* will be relied upon by similarly situated respondents throughout the United States.[3] It is further safe to assume that such challenges will arrive not only from civilly committed sexual predators but from a full range of those who have been involuntarily confined through some sort of civil process.[4] Reversal of the *Young* decision is therefore necessary to maintain uniformity within this particular area of law. Indeed, the State of Washington has been placed in the difficult position of having mutually antagonistic decisions on whether an "as

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[3] The decision in *Young* will now provide an alternative means of attack for civilly committed persons to challenge otherwise valid commitment laws which have already been found not to violate double jeopardy. *See e.g., In re Linehan,* 594 N.W.2d 867, 871 (Minn.) (The SDP Act does not contravene double jeopardy), *cert. denied sub nom.* 120 S. Ct. 587 (1999); *In re M.D.,* 598 N.W.2d 799, 806 (N.D. 1999) (N.D.Cent. Code. § 25-03.3 does not violate double jeopardy).

[4] *See e.g, In re Indefinite Detention Cases,* No. CV 98-674 TJH (JWJX), 2000 WL 95306, *3-4 (C.D.Cal. Jan. 27, 2000) where the Court there addressed involuntary commitment procedures outlined in *Foucha v. Louisiana,* 504 U.S. 71 (1992). Given the approach the Court of Appeals takes in *Young v. Weston,* it is reasonable to conclude that those subject to deportation may look to *Young* in an effort to challenge their indefinite confinement pending repatriation.

applied" approach is necessarily possible. *See In re the Detention of Turay,* 139 Wash.2d 379, 421, 986 P.2d 790, 812, *as amended on denial of reh'g* (1999) (rejecting the Ninth Circuit's approach). Given this situation, a civilly committed predator in the State of Washington can rest assured that he may find success in federal court after having been denied relief by the Washington state courts, thus rendering the state court's review immaterial. This situation alone demands summary reversal.

Notwithstanding the need for uniformity, the fact remains that the Ninth Circuit's decision in *Young* provides untenable support for a challenge to one's conditions of confinement. Such a challenge is provided for within 42 U.S.C. § 1983, not 28 U.S.C. § 2254. It does not follow that concerns or questions about a predator's treatment conditions must lead to his release. A remedy of that sort is far too broad in response to a claim of unlawful conditions. 42 U.S.C. § 1983 provides the necessary remedy for appropriate claims in such circumstances. If not reversed, the Ninth Circuit's decision in *Young* will consequently lend credence to the availability of federal *habeas* review to challenge conditions of confinement, with the remedy not being correction of unconstitutional conditions but rather release from confinement altogether.

The Ninth Circuit's decision has far reaching implications. Most importantly, *Young* provides an inappropriate avenue for challenging the states' civil commitment laws outside of the approach this Court delineated in *Hendricks* and *Hudson.*

The *Amici* States respectfully submit that the Ninth Circuit's decision in *Young v. Weston* must be reversed.

CONCLUSION

The *Amici* States request that Washington's Petition for a Writ of Certiorari be granted and that the Ninth Circuit's decision be summarily reversed or, in the alternative, that the case be set for plenary review.

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PETITION FOR CERTIORARI FILED JANUARY 14, 2000
CERTIORARI GRANTED MARCH 20, 2000

158 P

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

98-35377

ANDRE BRIGHAM YOUNG,

Petitioner-Appellant,

vs.

DAVID WESTON, Superintendent of the
Special Commitment Center,

Respondent-Appellee.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/22/98	Filed original and 15 copies Appellant Andre Brigham Young's substitute opening brief 80 pages; 5 exc of rec in 3 vol; served on 9/18/98 [98-35377] (ft) [98-35377]
10/23/98	Filed original and 15 copies appellee David Weston's 62 pages brief, 1 Exc. vols; served on 10/19/98 [98-35377] (ft) [98-35377]
12/11/98	Filed original and 15 copies Andre Brigham Young reply brief, (Informal: n) 28 pages; served on 11/23/98 [98-35377] (ft) [98-35377]
3/26/99	Filed order (Deputy Clerk: gb) The parties are requested to file letter briefs addressing the status and relevance to this proceeding of the continuing state court proceedings regarding

DATE	PROCEEDINGS
	the conditions of Mr. Young's confinement. The letter briefs shall confine themselves to the discussion of this issue. The letter briefs shall not exceed three double-spaced pages in length and shall be filed with the Clerk's Office no later than noon, 4/1/99. (phoned; 11:10) [98-35377] (ft) [98-35377]
3/31/99	Filed Appellee David Weston in 98-35377's response to order of the court; (Fax copy Letter Brief, 3 pages); served on 3/31/99 (Faxed to Panel) [98-35377] (ft) [98-35377]
4/8/99	Filed Appellant Andre Brigham Young in 98-35377's response to court order of 3/26/99; served on 4/2/99 (Letter brief) (Fax to Panel) [98-35377] (ft) [98-35377]
4/14/99	ARGUED AND SUBMITTED TO Harry PREGERSON, David R. THOMPSON, Robert J. Kelleher [98-35377] (jmk) [98-35377]
5/20/99	FILED OPINION: REVERSED and REMANDED in part. AFFIRMED in part. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Harry PREGERSON, author; David R. THOMPSON; Robert J. Kelleher.) FILED AND ENTERED JUDGMENT. [98-35377] (ft) [98-35377]
6/17/99	Filed original and 50 copies Appellee David Weston in 98-35377 petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 6/16/99 (PANEL AND ALL ACTIVE JUDGES) [98-35377] (ft) [98-35377]

DATE	PROCEEDINGS
6/24/99	Filed original and 50 copies State of CA in 98-35377's amicus curiae brief (in support of David Weston's petition for rehearing en banc) of 8 pages; served on 6/24/99 (PANEL AND ALL ACTIVE JUDGES) [98-35377] (ft) [98-35377]
8/10/99	Filed Appellant Andre Brigham Young in 98-35377's response to petition for rehearing en banc; served on 5/20/99 (PANEL AND ALL ACTIVE JUDGES) [98-35377] (ft) [98-35377]
9/16/99	Filed order and amended opinion (Judges Harry PREGERSON, David R. THOMPSON, Robert J. Kelleher) The opinion filed 5/20/99 is amended as follows:.....See opinion.....With this amendment the petition for rehearing is denied and the suggestio [sic] for rehearing en banc is rejected. (Orig. opinion id:) REVERSED and REMANDED in part. AFFIRMED in part. [98-35377] (ft) [98-35377]
9/23/99	Filed David Weston in 98-35377 motion to stay the mandate. [98-35377] served on 9/22/99 [PANEL] (ft) [98-35377]
10/19/99	Filed order (Harry PREGERSON, David R. THOMPSON, Robert J. Kelleher): The motion to stay the issuance of the mandate is granted. [98-35377] (ft) [98-35377]
12/10/99	Received Appellee David Weston in 98-35377 letter dated 12/7/99 re: Asking that the Order staying the mandate be extended. (PANEL) [98-35377] (ft) [98-35377]

DATE	PROCEEDINGS
12/13/99	Received U.S. Supreme Court letter dated 11/30/99 re: Application for an ext of time within which to file a petition for a writ of certiorari in this case has been presented to Justice O'Connor who on 11/30/99 extended the time to and including 1/14/00. [98-35377] (ft) [98-35377]
1/7/00	Filed order (Harry PREGERSON, David R. THOMPSON, Robert J. Kelleher): The request for a continuance of the stay of the issuance of the mandate in this matter is granted. This order staying issuance of the mandate shall remain in effect pending final disposition of a petition for certiorari to the U.S. Supreme Court which is due to be filed with that court on or before 1/14/00. [98-35377] (ft) [98-35377]
1/24/00	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 99-1185 filed on 1/14/00. [98-35377] (ft) [98-35377]

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

94-CV-480

YOUNG,

vs.

WESTON.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
3/31/94	1	PETITION FOR WRIT OF HABEAS CORPUS under 28 USC 2254 by petitioner Andre Brigham Young Receipt No. 213934 (lr) [Entry date 04/06/94]
4/8/94	4	ORDER by Judge John C. Coughenour of reference to Magistrate Judge John L. Weinberg (cc: all counsel, JLW, JCC) (lr) [Entry date 04/11/94]
8/12/94	35	MOTION by respondent for summary judgment noted for 9/9/94 (ds) [Entry date 08/15/94]
8/19/94	166	MEMORANDUM OF AUTHORITIES by respondent in support of motion for summary judgment [35-1] (gm) [Entry date 02/12/98]

DATE	NO.	PROCEEDINGS
10/27/94	56	MINUTE ORDER: by direction of Magistrate Judge Philip K. Sweigert: GRANTING petitioner's motion for leave to file amended petition for writ of habeas corpus [50-1]. Respondents' answer to added claim due w/in 30 days. (cc: counsel, Judges JCC & PKS, JPM) ent 10/27/94 (ds)
10/27/94	57	AMENDED PETITION for writ of h/c by petitioner Andre Brigham Young (ds)
10/31/94	58	MOTION by petitioner for summary judgment or in the alternative for an evidentiary hearing noted for 12/2/94 (ds) [Entry date 11/01/94]
11/2/94	63	MEMORANDUM of law in support of a petition for writ of habeas corpus, (RESPONSE by petitioner) OPPOSITION to respondents' motion for summary judgment [35-1] AND REPLY in support of motion for summary judgment or in the alternative for an evidentiary hearing [58-1] (ds)
11/3/94	65	MOTION for ACLU to appear as amicus curiae and to file a brief noted for 11/18/94 (ds) [Entry date 11/04/94]
11/7/94	70	ORDER by Magistrate Judge Philip K. Sweigert: The ACLU's motion to shorten time [66-1] is GRANTED. The motion for ACLU to appear as amicus curiae and to file a brief [65-1] is noted for 11/9/94. (cc: counsel, Judges JCC & PKS) ent 11/7/94 (ds)

DATE	NO.	PROCEEDINGS
11/9/94	72	ORDER by Magistrate Judge Philip K. Sweigert GRANTING motion for ACLU to appear as amicus curiae and to file a brief [65-1] (cc: counsel, Judge) (ds)
11/9/94	73	(RESPONSE) MEMORANDUM of amicus curiae ACLU in opposition to respondent's motion for summary judgment [35-1] and in support of petitioner's writ of habeas corpus (ds)
11/16/94	74	MOTION of Washington State Psychiatric Association to submit amicus brief on behalf of petitioner noted for 12/2/94 (ds) [Entry date 11/17/94]
1/5/95	86	MINUTE ORDER: by direction of Magistrate Judge Philip K. Sweigert: The motion of Washington State Psychiatric Association to submit amicus brief on behalf of petitioner [74-1] is GRANTED. (cc: counsel, Judge, PKS, JCC, JPM) ent 1/5/95 (ds)
1/5/95	87	AMICUS BRIEF submitted by amicus WA State Psych Assoc on behalf of petitioner (ds)
2/2/95	94	REPLY by petitioner to State's RESPONSE to motion for summary judgment or in the alternative for an evidentiary hearing [58-1] (ds) [Entry date 02/03/95]
2/8/95	97	RESPONSE by respondent to petitioner's motion for summary judgment or in the alternative for an

DATE	NO.	PROCEEDINGS
		evidentiary hearing [58-1] (ds) [Edit date 03/20/95]
3/24/95	109	MINUTES: Oral Argument on motions for summary judgment: PKS; Dep Clerk: S. Wilsco; CR: Steve Broscheid; case called. Cnsl present: Sarah Sappington, Don Porter. Courth [sic] hears from Robert Boruchowitz & Sarah Sappington. Court take matter under consideration & will submit Report & Recommendation to Judge Coughenour. (gm)
5/4/95	114	MINUTE ORDER: by Judge John C. Coughenour: The Court hereby orders that the reference of this matter to Magistrate Judge Sweigert is withdrawn. The Court will advise the parties if further briefing or oral argument is necessary. terminating case referral to Magistrate Judge Philip K. Sweigert. [58-1], [35-1] (cc: counsel, Judge, JM, PKS) (gm) [Edit date 05/04/95]
8/25/95	117	ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT by Judge John C. Coughenour: The Court concludes that Washington's Sexually Violent Predator Statute, Wash. Rev. Code 71.09, violates the substantive due process component of the Fourteenth Amendment, the Ex Post Facto Clause, and the Double Jeopardy Clause. The other issues raised in the petition for a writ of habeas corpus need not be addressed. The writ is

DATE	NO.	PROCEEDINGS
		GRANTED. In anticipation of appeal, the Court directs the parties to brief the issue of release pending appeal. Each party shall file a brief on this issue no later than 9/5/95. The parties may file responsive briefs no later than 9/7/95. The parties shall indicate whether oral argument is requested. [58-1], [35-1] (cc: counsel, Judge) (gm)
8/25/95	118	JUDGMENT: Decision by Court. It is Ordered and Adjudged the Writ of Habeas Corpus is GRANTED. case terminated (cc: counsel, Judge, Jgm. Book) Entered on: 8/25/95 (gm)
9/5/95	120	MOTION by respondent David Weston, respondent WA State of for stay of writ pending appeal (gm)
9/11/95	128	ORDER by Judge John C. Coughenour GRANTING STAY PENDING APPEAL: This matter comes before the Court on the State's motion for a stay pending appeal. The Court heard oral argument on 9/8/95. The Court concludes that the balance of relevant interests tips in favor of granting a stay pending appeal. Accordingly, the State's motion for a stay is GRANTED. Mr. Young shall remain in detention during the pendency of the appeal. [120-1] (cc: counsel, Judge) (gm)
9/14/95	129	NOTICE OF APPEAL by respondent David Weston from Dist. Court

DATE	NO.	PROCEEDINGS
		decision, [117-1] (cc: CCA, Judge, counsel) (dc) [Entry date 09/15/95]
2/12/96	138	ORDER (CCA) [95-35958] The motion of the American Civil Liberties Union of WA Foundation to diel [sic] an amicus brief is granted. The brf lodged with the court is ordered filed. The accompanying appendix is rejected. The motion of the WA State Psychiatric Assoc. to file an amicus brf is granted. The brf lodged with the court is ordered filed. (ss) [Entry date 02/15/96]
8/5/96	143	ORDER (CCA) [95-35958] The appeal is withdrawn from submission pending the Supreme Court's disposition of Matter of Care & Treatment of Hendricks, 912 P.2d 129 (1996, cert. granted 64 U.S.L.W. 3830, 3837 (6/17/96), and further order of this order. (seal) [Entry date 08/12/96]
8/30/97	150	MANDATE (95-35958) from Circuit Court of Appeals REMANDING the matter back to the District Court [Appeal [129-1] (cc: JCC, all counsel) Order attached. (lb) [Entry date 09/03/97]
11/28/97	155	SUPPLEMENTAL BRIEF ON REMAND by petitioner [154-1] (gm) [Entry date 12/01/97]
12/19/97	158	RESPONSE to Petitioner's Supplemental Brief by respondents (gm) [Entry date 12/23/97]

DATE	NO.	PROCEEDINGS
1/2/98	159	REPLY BRIEF by petitioner Andre Brigham Young on remand [150-1] (gm) [Entry date 01/05/98]
1/30/98	164	MINUTES: Oral argument: JCC; Dep Clerk: J. Mahnke; CR: Joe Roth; Cnsl present: R. Burochowitz [sic]/Sara [sic] Sappington. Called. cnsl heard in argument. The Court will issue a written decision. (gm) [Entry date 02/02/98]
2/10/98	165	ORDER by Judge John C. Coughenour: Petitiner's [sic] writ of habeas corpus is hereby DENIED. (See Order for Details) [157-1], [154-1], [151-1] (cc: counsel, Judge) (gm)
2/25/98	167	MOTION by petitioner Andre Brigham Young to alter judgment (gm) [Entry date 02/26/98]
2/25/98	168	Appendices in support of motion to alter judgment (FILED IN EXPANDO) (gm) [Entry date 02/26/98]
3/9/98	170	RESPONSE by respondents to motion to alter judgment [167-1] (gm) [Entry date 03/10/98]
3/13/98	175	MINUTE ORDER: by direction of Judge John C. Coughenour DENYING Petitioner's motion to alter judgment [167-1] (cc: counsel, Judge) (gm)
3/19/98	176	NOTICE OF APPEAL by petitioner Andre Brigham Young from Dist. Court decision [175-1] (cc: CCA, JCC, counsel) (lb) [Entry date 03/26/98]

DATE	NO.	PROCEEDINGS
3/26/98	177	ORDER GRANTING CERTIFICATE OF APPEALABILITY by Judge John C. Coughenour (cc: CCA, all counsel, JCC) (lb)
7/14/99	183	ORDER (CCA 98-35377) Petitioner is requested to file a response to the petition for rehearing and suggestion for rehearing en banc. Said response shall be filed on or before 7/30/99. (lb) [Entry date 08/02/99]
10/21/99	184	ORDER (CCA 98-35377) The motion to stay the issuance of the mandate is granted. (lb) [Entry date 10/22/99]

THE SUPREME COURT OF WASHINGTON

57837-1

In re the Personal Restraint Petition of:

ANDRE BRIGHAM YOUNG

Petitioner.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
08/09/93	OPINION 65.40) 122 Wn.2d 1 Filed By: Durham, Barbara Mae (SCJ 02020) Status: Decision Terminating Review Filed Document Action: Filed
09/20/93	ORDER ON MOTIONS Order Denying Motions For Reconsideration 253/147 Filed By: Andersen, James A (SCJ 04336) Document Action: Filed

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

90-2-21319-6

In re the Detention of:

ANDRE B. YOUNG,

Respondent.

RELEVANT DOCKET ENTRIES

SUB #	DATE	DESCRIPTION
1	10/24/90	Petition For Detention
3	10/24/90	Certification For Probable Cause
4	10/24/90	Order For Warrant Issd
66	01/18/91	Order to Transport to K C Jail
69.4	01/22/91	Trial Minutes 051.50 Jyp 020.00 Cr Diane Meredith Cr Marci Cammon Cr Velma Haynes Judge Lloyd Bever, Dept 2
136	03/08/91	Order of Commitment Comnt Issd 03-08-91

Task Force
On
Community
Protection

The Seal of the State of Washington 1889

Final Report
to
Booth Gardner
Governor
State of Washington

[pp. II-20 to II-22]

CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS

The Task Force was created principally to answer one question: What gaps in our law and administrative structures allow the release of known dangerous offenders who are highly likely to commit very serious crimes?

The Task Force reviewed the current laws for the adult and juvenile criminal systems and the involuntary treatment laws. In each system, the Task Force identified an "end point" for state control. These end points are as follows.

- Offenders committed under the Sentencing Reform Act are sentenced to a definite term. The most serious offenders are supervised in the community for one year following release. When the confinement and supervision term expire, the state's control over these offenders ceases.

- State prison inmates sentenced under the indeterminate system (crimes committed before 1984) serve terms set by the Indeterminate Sentence Review Board and are released when they are "fit subjects for release." Some offenders are never found eligible for parole and serve their entire maximum term in prison; the majority are placed on parole. The Board loses all jurisdiction over the offender when the statutory maximum for the crime expires (five years for Class C felonies, ten years for Class B, and life for Class A). Many offenders who committed very serious crimes and are viewed as very dangerous were convicted of Class B offenses.
- The juvenile system loses all jurisdiction on juvenile offenders when they turn 18, unless the jurisdiction is extended by the juvenile court before the offender turns 18 and then the age is extended to 21.
- Persons found Not Guilty by Reason of Insanity under the criminal insanity law may be held for the statutory maximum of the crime they committed or until their mental illness is stabilized and they no longer present a danger to others. They can be held beyond the statutory maximum if they are found dangerous to self or others and are detained under the involuntary treatment law.
- Persons found incompetent to stand trial can be held for up to one year and 15 days (90 days if the person is developmentally disabled) in order to re-establish their competency. If competency cannot be re-established, the charges are dismissed without prejudice (charges can be refiled if the person regains competency at a later time). A person found incompetent to stand trial can be referred to a state hospital and held under the involuntary treatment law if the person is dangerous to self or others or is gravely disabled.

Civil commitment under the involuntary treatment law allows indefinite commitment, but is quite restrictive in its

definition. Under current laws, sexually violent predators only qualify for civil detention when a mental illness or mental disorder is present. The Task Force examined the histories of some individual violent predators who had been judged not to have a mental illness or mental disorder and therefore were not detainable.

The Task Force concluded that existing laws do not offer a sufficient safety net for confinement of sexually violent predators who meet these end points. The Task Force believes a safety net must be created to reduce future acts of violence.

The Task Force proposes creating a new civil commitment statute for sexually violent predators. Sexually violent predators are defined in the following ways.

- A person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence.
- The proposed definition of "predatory" is: acts directed towards strangers or towards individuals with whom a relationship has been established or promoted for the primary purpose of victimization.
- Sexual violence includes sex offenses, and also offenses with a special finding of sexual intent. "Sexual violence" means acts defined in RCW 9.A as Rape in the First Degree, Rape in the Second Degree, Rape of a Child in the First or Second Degree, Indecent Liberties by Forcible Compulsion, Child Molestation in the First or Second Degree, and any act of Murder in the First or Second Degree, Assault in the First or Second Degree, Kidnapping in the First or Second Degree, Burglary in the First Degree, and Residential Burglary if such act has been determined to have been sexually motivated.

Convictions for attempts or conspiracies to commit are also included in the definition.

The Task Force believes statutory requirements and procedural rights must be rigorous and constitutionally sound, and include the right to a jury trial, the right to counsel, the right to offer evidence and cross-examine witnesses, and the right to require the state to prove its case beyond a reasonable doubt.

During the period of confinement, the person will be treated by psychiatrists and other professional experts using an individualized treatment plan. A formal examination of the person's mental condition will be conducted each year and the written report made available to the court which committed the person.

If the treatment professionals determine that the person's mental abnormality or personality disorder has changed and the person is not likely to commit predatory acts of sexual violence, the person can petition the court for release. The burden of proof shall be on the state to show by a preponderance of evidence that the petitioner's mental abnormality or personality disorder has not changed and the person is not safe to be at large and that if released, it is likely the person will commit predatory acts of sexual violence. The person also has the right to petition the court for release without the endorsement of the treatment professionals. In this situation, the person has the burden of proving he or she is safe to be at large and, if released, will no longer commit predatory acts of sexual violence.

[Filed October 24, 1990]

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In re the Detention of ANDRE BRIGHAM YOUNG,	) NO. 90-2-21319-6
	) PETITION
Respondent.	)

I, Norm Maleng, Prosecuting Attorney for King County, in the name and by the authority of the State of Washington, do allege that respondent Andre Brigham Young is a sexually violent predator, given the following:

Respondent Young has been convicted in King County, Washington, of a sexually violent offense, to wit: Rape in the First Degree, defined in RCW 9A.44.040, and his sentence on that conviction is about to expire on October 25, 1990. Furthermore, respondent suffers from a mental abnormality or personality disorder which makes him likely to engage in acts of sexual violence directed toward strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization;

Therefore, pursuant to § 1001-1013 of Chapter 3, Laws of 1990, respondent should be committed to the custody of the Department of Social and Health Services in a secure facility for control, care, and treatment until such time as his mental abnormality or personality disorder has so changed that he is safe to be at large.

NORM MALENG
King County Prosecuting Attorney
/s/Tim M. Blood
TIMOTHY M. BLOOD
WSBA ID #91002
Deputy Prosecuting Attorney

[Filed October 24, 1990]
90-2-21319-6

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

That Timothy M. Blood is a Deputy Prosecuting Attorney for King County, and is familiar with the investigation conducted by the Washington State Department of Corrections and various law enforcement agencies in King, Pierce and Thurston Counties relating to respondent Andre Brigham Young;

Pursuant to §§ 1001-1013 of Chapter 3, Laws of 1990, petitioner State of Washington sets forth the following in support of its motion for the determination of probable cause that respondent Andre Brigham Young is a sexually violent predator.

In the last 28 years, respondent Andre Young has been convicted of six felony rapes, five of which were Rapes in the First Degree. He has been at large in the community, with the opportunity to rape, only 11 of those 28 years. All of his known rapes have been against adult female strangers.

Respondent's first known rapes include four Rapes in the First Degree, all of which he was convicted in October, 1963, after a jury trial in Pierce County Superior Court Cause Number 34699. He committed those four rapes in the months of September, October, and November, 1962. In each of the four instances, respondent committed the sexual assault on an adult female stranger, by penile-vaginal intercourse, after unlawfully entering her residence. In at least two of the 1962 rapes, respondent was armed with a knife, and two of his convictions on those rapes include a deadly weapon finding.

After being sentenced on the 1962 rapes, respondent was subsequently released from custody on an appeal bond in March, 1964. Less than two months later, in May 1964,

respondent unlawfully entered an adult female stranger's residence in Thurston County. Once in the victim's home, respondent robbed her of property, tied her up, pulled his penis out of his clothing, and spoke of raping her, but never followed through with the act. He eventually fled her residence. Although respondent was charged for those acts in Thurston County Superior Court Cause Number C-3097, the matter was never disposed of on its merits as respondent came to be adjudged incompetent to stand trial.

After committing the above-referenced acts in Thurston County in 1964, respondent remained in the custody of the Department of Corrections on his four 1962 rapes until January 1972, at which time he was paroled. When he committed his next known rape on October 9, 1976, he was still on parole, and had been out in the community for less than five years.

In committing the 1976 offense, respondent again unlawfully entered an adult female stranger's residence. At the time, this particular victim was asleep in her Auburn apartment. She awoke to find respondent standing over her, with coverings over his hands and part of his face. After briefly holding a fork to her throat, he announced to his victim that he was going to rape her. The terrified woman did not physicaliy or verbally resist as respondent then entered her vagina with his penis and subjected her to intercourse. In connection with this incident, respondent pleaded guilty to Rape in the Third Degree in January, 1977, in King County Superior Court Cause Number 78895.

After being sentenced on the 1976 rape, respondent returned to the Department of Corrections until June, 1980, when he was again paroled. He had been at large for less than 5 ⅓ years when he committed his most recent known rape on November 8, 1985.

In committing the 1985 rape, respondent forced his way into the home of yet another adult female stranger's home; this woman's home was in south Seattle. With socks

covering his hands, and what felt to his victim like a gun underneath his jacket, respondent forced the woman into a bedroom of her home and raped her by penile-vaginal intercourse. He then fled from her home with her telephone in his hands. In connection with these acts, respondent was convicted of Rape in the First Degree after a jury trial in August, 1986, in King County Superior Court Cause Number 86-1-00483-8.

On his most recent rape conviction, respondent was once again sentenced to a term of confinement with the Department of Corrections. He is presently scheduled to be released out into the community on October 25, 1990.

Over the years, respondent has consistently denied committing any of the above-referenced crimes of which he has been convicted. With respect to his Rape in the Third Degree conviction, he has repeatedly asserted that the sexual act was consensual. With respect to his other five convictions, he has repeatedly claimed that each of the five victims mistakenly identified him as her rapist. Not surprisingly, respondent is not known to have ever sought out or obtained any professional sex offender treatment in the last 28 years.

Recently, a review of respondent's records at the Department of Corrections was conducted independently by two different psychologists. Those records include virtually all of the facts set forth above, as well as a great deal of other historical information on respondent.

Dr. Savio Chan, Ph.D., a psychologist with the Department of Corrections, completed his review of respondent's records on or about August 13, 1990. Based on the nature, pattern, and number of rapes that respondent has committed, Dr. Chan concluded that respondent likely has "a psychological abnormality . . . in the form of sexual sadism which has apparently been present for at least 25 years." Assuming the correctness of that diagnosis, Dr. Chan further concluded that respondent "has a very high likelihood to

engage in acts of sexual violence [against strangers] in the future."

Dr. Irwin S. Dreiblatt, Ph.D., a clinical psychologist in private practice, completed his review of respondent's records on or about October 6, 1990. Dr. Dreiblatt has concluded that respondent appears to presently suffer from mental abnormalities in the forms of "a severe, chronic paraphilia (sexual disorder)," and "sexual sadism." The psychologist has also concluded that respondent likely has a "mixed personality disorder with primarily paranoid and antisocial features." Dr. Dreiblatt has further concluded that, taken separately or in combination, respondent's mental abnormalities and personality disorders "affect his volitional control surrounding sexual conduct and predispose him to commit serious, violent acts against [women strangers]" and "create . . . the likelihood" that he will commit such violent sexual acts in the future.

Under penalty of perjury under the laws of the state of Washington, I certify that the foregoing is true and correct. Signed and dated by me this 24th day of October, 1990 at Seattle, Washington.

/s/Tim M. Blood
TIMOTHY M. BLOOD
WSBA ID #91002
Deputy Prosecuting Attorney

[Filed October 24, 1990]

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In re the Detention of	) NO. 90-2-21319-6
	)
ANDRE BRIGHAM YOUNG,	) MOTION AND ORDER) DETERMINING) EXISTENCE OF
Respondent.	) PROBABLE CAUSE AND) DIRECTING ISSUANCE) OF A WARRANT FOR) RESPONDENT'S) CUSTODIAL DETENTION

MOTION

The petitioner, State of Washington, having informed the court that it is filing herein a petition alleging that respondent is a sexually violent predator, now moves the court for an order determining the existence of probable cause and directing the issuance of a warrant for respondent's custodial detention.

In connection with this motion, the petitioner offers the information set forth in the affidavit attached to the petition herein.

NORM MALENG
King County Prosecuting Attorney

/s/Tim M. Blood
TIMOTHY M. BLOOD, WSBA ID #91002
Deputy Prosecuting Attorney

ORDER

The court, having reviewed the affidavit submitted herein, hereby determines that probable cause exists to believe that the above-named respondent is a sexually violent predator as alleged in the petition herein; and

IT IS ORDERED that the Clerk of the Superior Court issue a warrant, returnable forthwith, for the custodial detention of the above-named respondent, with no bail pending appearance before the court; and

IT IS FURTHER ORDERED that upon his custodial detention, the above-named respondent shall be transferred pursuant to §1004 of Chapter 3, Laws of 1990, to the Special Commitment Center of the Department of Social and Health Services at Monroe, Washington for an evaluation as to whether the respondent is a sexually violent predator.

DONE IN OPEN COURT this 24th day of October, 1990.

/s/Charles Johnson
JUDGE

Presented by:

/s/Tim. M. Blood
TIMOTHY M. BLOOD, WSBA ID #91002
Deputy Prosecuting Attorney

[Filed October 24, 1990]

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In re the Detention of	)	
	)	
ANDRE BRIGHAM YOUNG,	)	NO. 90-2-21319-6
	)	
	)	ORDER OF TRANSPORT
Respondent.	)	
	)	

THIS MATTER having come before the court on this 24th day of October, 1990, the court having found that probable cause exists to believe that the above-named respondent is a sexually violent predator as alleged in the petition herein, and having directed the issuance of a warrant for the respondent's custodial detention, does hereby direct and order the Department of Corrections to transfer the respondent, Andre Brigham Young, from the Twin Rivers Corrections Center at Monroe, Washington, to the Special Commitment Center of the Department of Social and Health Services, located in Monroe, Washington, no later than October 25th, 1990, for custodial detention and evaluation pursuant to the court's order.

DONE IN OPEN COURT this 24th day of October, 1990.

/s/Charles Johnson
JUDGE

Presented by:

/s/Tim M. Blood
TIMOTHY M. BLOOD, WSBA #91002
Deputy Prosecuting Attorney

[Filed January 18, 1991]

IN SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

In re the Detention of	)	
	)	
ANDRE BRIGHAM YOUNG,	)	NO. 90-2-21319-6
	)	
	)	ORDER OF
Respondent.	)	TRANSPORTATION
	)	

THIS MATTER having come on before the undersigned Judge of the above-entitled court, the respondent, ANDRE BRIGHAM YOUNG, presently incarcerated at the Special Commitment Center ("SCC") of the Department of Social & Health Services ("DSHS") in Monroe, Washington, a trial having been scheduled for Monday, January 28, 1991 in this case, and Mr. Young's attendance being required at that hearing, now, therefore,

IT IS HEREBY ORDERED that the King County Sheriff, Department of Public Safety, transport ANDRE BRIGHAM YOUNG from DSHS custody at SCC to the King County Jail no later than January 24, 1991.

IT IS FURTHER ORDERED that a certified copy of this order be provided to Mr. Young's counsel at public expense.

DONE IN OPEN COURT this 18th day of January, 1991.

/s/Lloyd Bever
THE HONORABLE LLOYD BEVER

Presented by:

/s/Ann Engelhard
ANNIE ENGELHARD,
No. 15392
Attorney for Respondent

Approved as to Form:

/s/Tim Blood
TIM BLOOD, No. 14004
Deputy Prosecuting Attorney

INSTRUCTION NO. 8

To find that the respondent, Andre Brigham Young, is a sexually violent predator, each of the following elements must be proved beyond a reasonable doubt:

(1) That the respondent has been convicted of a crime of sexual violence: specifically, of an act defined in Title 9A RCW as rape in the first degree;

(2) That the respondent suffers from a mental abnormality or personality disorder; and

(3) That such mental abnormality or personality disorder makes the respondent likely to engage in predatory acts of sexual violence.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that the respondent is a sexually violent predator.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one or more of these elements, then it will be your duty to return a verdict that the respondent is not a sexually violent predator.

[Filed March 8, 1991]

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In re the Detention of:	)	
	)	
ANDRE BRIGHAM YOUNG,	)	NO. 90-2-21319-6
	)	
	)	ORDER OF
Respondent.	)	COMMITMENT
	)	

Upon the verdict of the jury on March 8, 1991, that the respondent, Andre Brigham Young, is a sexually violent predator pursuant to RCW 71.09.060, and the verdict having been duly filed on March 8, 1991, the court hereby enters the following:

ORDER OF COMMITMENT

The respondent, Andrew [sic] Brigham Young, is hereby committed to the Special Commitment Center in Monroe, Washington, to the custody of the Department of Social and Health Services, for control, care, and treatment until such time as respondent's mental abnormality or personality disorder has so changed that respondent is safe to be at large.

DONE IN OPEN COURT this 8th day of March, 1991.

/s/Lloyd Bever
The Honorable Lloyd Bever
Judge of the Superior Court

Presented by:
/s/Tim M. Blood
TIMOTHY M. BLOOD, WSBA #14004
Attorney for Petitioner

Copy not received:

/s/Anne Engelhard
Anne E. Engelhard, WSBA #15392
Attorney for Respondent

[Filed August 30, 1993]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of ANDRE BRIGHAM YOUNG,	) NO. 57837-1)) MOTION FOR) RECONSIDERATION
Appellant/Petitioner	)

1. The appellant/petitioner Andre B. Young by and through his attorney, Robert C. Boruchowitz, moves pursuant to RAP 12.4

2. for reconsideration of the August 9, 1993, decision herein, as outlined below.

3. This motion is based on the record and file herein, and on the argument and authorities cited below.

4. Statement of Grounds for Relief and Argument

A. The Court has Overlooked Evidence In the Record Concerning Conditions In the Special Commitment Center and Misapprehended The Impact of that Evidence

The Court has written that "There is no evidence in the record addressing either the actual conditions of confinement, or the quality of treatment....Facially, the Statute and associated regulations suggest that the nature and duration of confinement is compatible with the purposes of the commitment." *Personal Restraint of Young*, 122 Wn.2d 1, 35 (1993). In fact, there is evidence in the record supporting the conclusion that the nature of the confinement is punitive.

The Trial Court In Mr. Young's Case Refused to Permit Testimony Regarding the Conditions of Confinement at SCC

The petitioners attempted to present evidence on the actual conditions of confinement and the quality of treatment, but the trial court in Mr. Young's case ruled those questions irrelevant and would not permit the testimony. The Court has overlooked the record presented in the consolidated case of *In the Detention of Cunningham*, in which the defense did present evidence about the punitive nature of the commitment facility and its staff.

In a pre-trial hearing, the judge in Mr. Young's case said that "The evidence of penalty or treatment is not directly relevant or related to the issue of whether or not respondent, under the statute, is a sexually violent predator." RPY 2/13/91 p.100.

The defense argued that their experts needed "to be able to discuss the type of facility that is involved, the kind of treatment that exists or does not exist." RPY 2/14/91 p.14. The court ruled that "...evidence of what happens in the commitment process following a finding that a person is a sexually violent predator is not an issue for proof in this proceeding." *Id.*, at 19.

In limiting the testimony of the defense expert, the judge stated: "My prior ruling was that the future treatment was irrelevant to the issues." RPY 3/1/91 at 60. He would not permit discussion of the treatment question either in a challenge to the law or before the jury.

The court prevented the defense expert Dr. Nancy Steele from testifying about her review of Mr. Young's records and her opinion about Mr. Young's possible dangerousness because it felt that such testimony would go beyond the pretrial notice. RPY 3/1/91 at 27. In the defense offer of proof, Dr. Steele testified about her knowledge of the conditions at the Special Commitment Center, based on her

discussions with the superintendent, her review of the progress notes, and her discussions with Mrs. Young. She testified that conditions at SCC "are very harsh right now and unnecessary—probably unnecessarily harsh, which increases the antagonism and the hostility between him and the staff, that they are motivated by some misguided notion *that they are there to punish him rather than to treat him.*" RPY 3/1/91 at 107 (emphasis added). No classes were established. *Id.*, at 108. She described the SCC setting as "That sounds like the worst kind of prison setting for the worst acting-out, difficult, problematic kind of inmate, which he wasn't." *Id.*, at 109.[1]

Dr. Vernon Quinsey, in a report cited by the Court, discussed the "excessive physical security and rule related security" he found at SCC, and the "inconsistent application of disciplinary rules...." *Review of the Washington State Special Commitment Center Program for Sexually Violent Predators*, (February, 1992) at 5.

Dr. Fred Wise testified that he had reviewed the chart notes from the institution, and that the "primary therapist" had made several inappropriate, unprofessional entries in the notes that were laden with value judgments and appeared unsubstantiated. RPY 3/4 152-153.

At the hearing on the defense motion for new trial, Mr. Young and his counsel raised issues about the conditions at the institution, alleging that he was not accorded the fundamental rights he had received as a prisoner in prison. RPY 4/12/91 at 25-6. The court indicated its uncertainty "whether or not there are even ground rules established at the

[1] The appellant urges the Court to reconsider also the exclusion of Dr. Steele's testimony. It became even more important because the court allowed the prosecutor to argue to the jury that the only expert who reviewed Mr. Young's records was Dr. Dreiblatt, when the prosecution knew that Dr. Steele had as well. RPY 3/5/91 at 79. RPY 3/1/91 at et.seq.

institution" but said that his court was not "the correct forum".

The Limited Testimony Permitted by Mr. Cunningham's Trial Court Demonstrated the Punitive Nature of SCC's Conditions

Mr. Cunningham first raised issues about his treatment at SCC in a pretrial hearing. He asked the court to assist him, saying that he had "no access to the legal library...." RPC 3/15/91 at 8-9. He told the judge that he had less rights at SCC than he had had in prison. Defense counsel then tried to elicit information about the conditions at SCC and the conduct of the staff through its superintendent, David Weston. The prosecutor immediately objected to such testimony as irrelevant.

The defense responded that "probably the central position of the respondent is that this statute is more punitive than it is treatment oriented....for me to develop a factual basis for that I need to develop for the Court what it looks like out there at the Special Commitment Center." RPC 3/15/91 at 19-20.

The trial court said that "some limited information can be given as to the present operation....I did not intend to spend a lot—take a lot of your time with that, simply because the statute doesn't say that the present operation of SCC as it stands is a place where the person has to go." *Id.*, at 21-22.

Mr. Weston said that he relied in part on Department of Corrections policy in developing SCC policy. *Id.*, at 22-23. The Special Commitment Center is housed within a DOC facility, the Special Offenders Center.

Mr. Weston testified that there was no grievance procedure at SCC. *Id.*, at 24. There were no written policies or procedures for making the assessment for recommendation on whether a person should be released. *Id.*, at 26.

Mr. Weston testified: "*Because we are a prison* there are security requirements for attorneys to come through." *Id.*, at 28 (emphasis added).

Defense investigator Dan Whitmore testified about the differences he observed between the SCC and the DOC Twin Rivers prison facility. *Id.*, at 31 et.seq. He noted major differences in the amount of recreation facilities. Twin Rivers had a full gym with a variety of exercise equipment, outdoor basketball courts, running track, and yard. SCC had a limited recreational facility with a pool table. The prosecutor again objected to the relevance of the testimony. *Id.*, at 33. The court initially would not permit additional testimony. *Id.*, at 34. Defense counsel made an offer of proof outlining the differences in activities and facilities available, saying: "Ultimately the SCC facilities are very bleak. The prisoners really don't have much activities and much privilege in their work, in their day-to-day lives." *Id.*, at 35.

The prosecution agreed that "there are distinctions, your Honor." *Id.*, at 35.

Mr. Whitmore testified that there is no employment at SCC, no activity areas or work benches, and no ability to go to a library, but only to order books. Once committed, a person can have access to the large yard where there is a running track. *Id.*, at 40.

Mr. Cunningham testified about the differences between the DOC facilities in which he served approximately six years and SCC. *Id.*, 41 et.seq. He did not have access to a law library at SCC, although he did in prison, "as much as you want." There was no weight room at SCC; the basketball they had was worn out. In prison he had access to exercise equipment and recreation directors. There were no classes at SCC; there were in prison, including GED, college courses, psychological training, business courses. At SCC there were no work opportunities for people not yet

committed. Those committed could earn $1.00 a day in janitorial work.

Mr. Cunningham also described the written disciplinary procedures in prison, which included the right to a hearing. At SCC, there were no written policies. Visits with ministers in prison were in private rooms. At SCC, visits were in a room with a microphone permitting the staff to listen. *Id.*, at 47. In prison, he could have fingernail clippers, Q-tips, and other cleaning items. At SCC they had to check out such items for limited time. The prison had hot water pots; SCC denied them. Mr. Cunningham was told that his calls with his attorney would be on phones in the hall. *Id.*, at 50.

Mr. Cunningham also advised the court that when he was to be taken for dental care, he was taken in shackles by DOC guards. RPC 5/8/91 at 21-23.

The WAC Regulations Do Not Provide SCC Committees a Wider Range of Privileges Than Those Provided in Prison

The Court cited WAC 275-155-050 as evidence that the committed persons enjoy "a wider range of privileges than those associated with a prison setting." 122 Wn.2d 1, at 35. This supported its conclusion that the nature of commitment under RCW 71.09 is compatible with a treatment purpose, and its conclusion that the statute is *civil*.

But the regulations the Court cites, WAC 275-155-050, simply set out minimal rights about clothes and possessions which also apply in prison. The guarantee of adequate care and treatment is a general one, and the trial court in Mr. Young's case would not permit testimony about it.

The WACs contain numerous provisions on prison inmate mail and telephone communications. For example, WAC 137-48-080 provides that "Telephone facilities shall be provided in appropriate numbers and locations to permit

reasonable and equitable access to all inmates...."This [sic] is similar to WAC 277-155-050(3)(f). WAC 137-48-060 provides for funds for postage for indigent prison inmates. This is similar to WAC 275-155-050(3)(g) which permits committed persons in SCC to send correspondence.

WAC 275-80-844 states that the "Superintendent shall...as appropriate, promptly and tentatively approve visits for the immediate family." This is similar to WAC 275-155-050 which permits SCC inmates "approved visitors within reasonable limitations."

The appellant/petitioner asks the Court to reconsider the testimony presented and the fact that the judge in Mr. Young's case would not permit testimony concerning the conditions of confinement or the quality of treatment at SCC. In fact, the testimony does not support a conclusion that the nature of commitment is compatible with the purposes of treatment. If the Court feels that the record needs additional information, Mr. Young asks that the Court permit him to supplement the record, or remand the matter to superior court for testimony on the issue. Considerable information has been gathered during the pendency of this appeal, and copies of some of it are attached. For example, the SCC has been advised by the attorney general's office that it can shoot to kill someone attempting to escape the institution. (See attached memorandum from Bill Dehmer to Andre Young February 2, 1993, and accompanying memorandum from an assistant attorney general, June 21, 1990.) The appellant asks that the Court permit the supplementation of the record with these memoranda.

B. The Court Has Misapprehended the Law on Validity of Prior Convictions and Overlooked Recent Precedent Which Requires Reversal Because of the Admission of Invalid Convictions

The Court has ruled that the trial court properly admitted evidence of four rape convictions in 1963, despite

the defense argument that the jury instructions in those cases were in error. The Court applied by analogy to sentencing under the SRA the reasoning of *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, *cert. denied*, 479 U.S. 930 (1986). The Court reasoned that a facially valid judgment and sentence can be used in a sentencing proceeding and that a civil commitment respondent would have no greater constitutional protections in this regard.

Yet the Court does not address *State v. Summers*, 120 Wn.2d 801 (1993), which the defense provided as supplemental authority. In *Summers*, this Court reversed a firearms act conviction because the underlying conviction was constitutionally invalid because of an erroneous jury instruction. The Court, relying on habitual criminal caselaw [sic], found that the defendant was seeking to "foreclose the *prior* conviction's *present* use to establish an essential element of RCW 9.41.040, *i.e.*, a constitutionally valid conviction for a 'crime of violence'." 120 Wn.2d at 810.

Similarly, Mr. Young was seeking to foreclose the use of a prior conviction to establish an essential element of the "predator" petition, namely, that he had been convicted of rape. The use of Mr. Young's 1963 convictions, both to bolster the element of a prior conviction and to support the conclusion that he is violent and likely to reoffend, is more analogous to *Summers* and its predecessor cases than it is to *Ammons*.

In *Ammons*, the defendant had been convicted and the question was not whether he should be sentenced, but what the sentence should be. The Court analogized the SRA proceeding to a parole revocation "because the individual has been convicted and the sentencing body is determining the terms and conditions of the sentence within a lawful maximum." 105 Wn.2d at 186. The Court noted that the presumptive standard sentence range, regardless of the number of prior convictions, can never exceed the statutory maximum sentence for the current offense. *Id.*, at 187.

Yet in the "predator" proceedings, the question is much more like the one in *Summers*. The jury must decide whether the respondent is a "predator" based in part on a finding of past crime. In the habitual criminal and VUFA cases, the jury also must find as an element of the offense whether the past crime occurred. The jury in a "predator" case is being asked to find beyond a reasonable doubt that various elements have been proven, including a prior conviction of rape. There is not even a question of length of commitment if the prior conviction is not proven, and if the jury is unable to find a likelihood of future dangerousness. The *Ammons* analysis applies to sentencing *after* the elements are proven beyond a reasonable doubt. The *Summers* analysis applies *before* the fact finder reaches a decision on guilt or commitment.

The Court in *Ammons* found that a preponderance of the evidence standard was sufficient to determine prior convictions. Yet in the "predator" cases, the statute requires that proof of all elements, including prior convictions, be beyond a reasonable doubt. Again, analogy to the *Summers* line of cases is more appropriate.

Finally, the Court has overlooked the fact that the present proceeding is a combined direct appeal and personal restraint petition. The *Ammons* court quotes Judge Ringold to the effect that the inmate wishing to challenge the use of a prior conviction may file a personal restraint petition. 105 Wn.2d at 188. Mr. Young did in fact file a personal restraint petition in this Court which was consolidated with his direct appeal. It would seem that effective judicial economy would permit this Court to address his challenge to the use of the unconstitutional conviction in this proceeding rather than compel additional proceedings. The jury instruction in his 1963 case had been ruled unconstitutional by the Ninth Circuit in 1958. (See app. op. br., p. 88 et. seq.)

Mr. Young asks this Court to reconsider and to apply *Summers*, *supra*, and to reverse for a new trial without the use of the 1963 unconstitutional convictions.

C. The Court Has Misapprehended the Impact of Evidence of the Bomb Threat Conviction

The Court found that while the 1972 bomb threat conviction was irrelevant, its admission was harmless. 122 Wn.2d at 54. Yet in the picture that the prosecution presented, this evidence was inflammatory and was used to support its portrait of Mr. Young as generally violent. The prosecutor argued to the jury: "The number of past violent sexual acts and arrests, not just sexually violent acts, but he relied on documents that Mr. Young has committed many other crimes as well, not all of which he has been convicted for." RPY 3/5/91 at 83.

The appellant urges the Court to reconsider its finding that the error was harmless.

CONCLUSION

The Court should grant reconsideration because the conditions at the commitment center do not support a conclusion that the effect of the law is not punitive, because applicable case law requires reversal because of the admission of unconstitutional convictions, and because the admission of an irrelevant conviction prejudiced Mr. Young's trial.

Respectfully submitted,

/s/Robert C. Boruchowitz WSBA 4563

The Defender Association
810 Third Avenue #800
Seattle, Washington 98104
206 447 3900

MEMORANDUM

February 2, 1993

TO: Andre Young

FROM: Bill Dehmer, SPP Director
Special Commitment Center

SUBJECT: RESPONSE TO SUGGESTION/ COMPLAINT

I have received and reviewed your memo dated 1/26/93. I encourage you to raise these issues with your assigned therapist. My response is listed below:

I have attached a copy of an opinion issued from the Attorney General's Office. Based on this opinion, David Weston has decided to allow access to the big/small yards only to residents who have been committed to the Special Commitment Center. This has been in effect since when we began as an agency.

c: Karen Sullivan, FT 3
Norm Nelson, FT 2
Andre Simon, PSA
Jan/Central File

OFFICE OF THE ATTORNEY GENERAL

MEMORANDUM

June 21, 1990

TO: Dave Weston, MHD, OB-42F

FROM: Jeff Freimund, AAG, QF-11

SUBJECT: Use of Deadly Force to Prevent Escapes of Civilly Committed Violent Sexual Offenders

You asked whether Department of Corrections (DOC) personnel are permitted to use deadly force to prevent the escape of a civilly committed sexual predator from the Special Offenders Center (SOC) where the new Sexual Predator Program (SPP) will be housed. Although it is a close question, the short answer is that, in my opinion, there is lawful authority for using deadly force to prevent the escape of sexual predators who have been found by a court to have committed a violent sexual offense and likely to re-offend.

There is no case law that I have been able to find that directly addresses this question. However, there is case law involving analogous situations where courts have addressed the use of deadly force against suspected dangerous felons. *See generally* Annot., 83 A.L.R. 3d 174 (1978 and Supp. 1989) (entitled "Modern Status: Right of Peace Officer to Use Deadly Force in Attempting to Arrest Fleeing Felon"). The modern rule is that where a police officer has probable cause to believe that a person has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used (1) if necessary to prevent escape and (2) if, where feasible, some warning has been given prior to using deadly force. *Tennessee v. Garner*, 471 U.S. 1, 11-12, 85 L. Ed. 2d 1, 10, 105 S. Ct. 1694

(1985). In other words, it is not unconstitutional for a police officer, after a warning, to shoot a fleeing felon who the officer has probable cause to believe committed a violent felony. In these situations, there is no requirement that a court must have first found beyond a reasonable doubt that the felon did indeed commit the violent crime, or that he is likely to re-offend. On the other hand, it is unconstitutional, in violation of the Fourth Amendment protection against unreasonable "seizures," to use deadly force to prevent escape of a suspected felon or misdemeanant who does not pose a threat of serious physical harm to either the officer or others. *Id.*

In *Garner*, the Court found that the police officer involved violated the Fourth Amendment rights of the suspect he shot and killed as the unarmed suspect was fleeing the scene of a residential burglary. At the trial the officer stated that he had shot the fifteen-year-old suspect because he believed that he would escape the scene if he did not use deadly force to prevent the escape; he had no probable cause to believe the suspect posed a danger of physical harm to others. The Court found the shooting to be in violation of the Fourth Amendment, ruling as follows:

> We conclude that such force may not be used unless [1] it is necessary to prevent the escape and [2] the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

Garner, *supra*, at 3; 85 L. Ed. 2d at 4.

As noted in *Garner*, the conclusion reached in that case constitutes the common law rule on using deadly force. *Id.* at 16; 85 L. Ed. 2d at 12-13. The State of Washington is in accord with this common law rule. RCW ~~9A.~~16.040 (1986); *Reese v. Seattle*, 81 Wn.2d 374, 379-83 (1972), *cert. denied*, 414 U.S. 832 (1973).

In the context of preventing convicted felons from escaping correctional facilities, it is well established that deadly force may be used to prevent such escapes. *E.g.*, RCW 9A.16.040(1)(c)(ii-iii). This principle seems to be so firmly established that I am unable to find any recent case law seriously disputing the important governmental objectives underlying such use of deadly force.

In the situation presented here, however, the individuals housed in the Sexual Predator Program at SOC will have been civilly committed based in part on felonious conduct, rather than criminally convicted of a felony. The issue is thus whether the use of lethal force against them should be prohibited, but may be used against convicted felons housed in the same facility. As indicated above, my answer is no. The civilly-committed sexual predators will have been found beyond a reasonable doubt to have committed a violent felony, just like many of the convicted felons housed in the facility (although some of those convicted felons may not have committed *violent* felonies). Unlike convicted felons, the civilly-committed sexual predators will *also* have been found beyond a reasonable doubt to present a likelihood of committing similar violent acts. Consequently, a strong argument can be made that the public policy underlying the use of deadly force, which is essentially to prevent the imminent threat of serious harm to others, is more compelling in the situation of a civilly-committed sexual predator who has been determined likely to harm again than in the situation of a convicted felon who has not been so determined and who may or may not have committed a *violent* felony. In at least two cases I am aware of that involved civilly-committed, violent sexual offenders housed in state prisons where perimeter security is provided by armed correctional officers, the courts did not find that the potential for use of deadly force to prevent escapes was unconstitutional, although that issue was not before the courts nor directly addressed. *See Allen v. Illinois*, 478 U.S. 364, 92 L. Ed. 2d 296, 106 S. Ct. 2988 (1986); *Doe v. Gaughan*, 808

F.2d 871 (1st Cir. 1988); attached memo to me from Law Clerk Carol Murphy. For these reasons, I believe that a policy substantially similar to DOC's existing Policy No. 420.200 (governing the use of firearms) would withstand constitutional challenge in our courts even if applied to civilly-committed sexual predators.

A closer question is presented by whether deadly force is justified against alleged sexual predators committed to SOC for 45-day evaluations upon a finding of probable cause by a court that the individuals may be sexual predators. Unlike those individuals indefinitely committed following a judicial finding beyond a reasonable doubt that the individuals are sexual predators and are likely to re-offend, there has only been probable cause findings at this point for those individuals committed for 45-day evaluations. Thus, the threat to society presented by an escape of such individuals is not as firmly established as is the case for those found beyond a reasonable doubt to present such a threat.

Nonetheless, as discussed above, the use of deadly force is justified when a police officer, on his own, has probable cause to believe a person presents a likelihood of serious harm to others if permitted to escape from the scene of a felony. Therefore, the Constitution does not require that a court must find beyond a reasonable doubt that a person presents a threat of serious harm to others before deadly force may be justified. A probable cause belief may suffice in some limited circumstances.

However, given the close nature of the question presented here, my suggestion would be that individuals committed to the SPP program for 45-day evaluations should be segregated from other SPP residents in a manner that virtually eliminates the opportunity of escape. In short, some thought should be given to limiting, if not eliminating, the opportunity for outside yard exercise for those residents housed at SPP for up to 45 days for evaluations. This procedure would avoid the problem of potentially having to

adopt separate use of force policies for indefinitely committed individuals and for individuals committed for up to 45 days. Of course, exercise opportunities should be given to all SPP residents, but access to the outside yard may have to be limited for those committed to the SPP for up to 45 days.

In summary, it is my opinion that a policy authorizing the use of deadly force to prevent the escape of indefinitely committed sexual predators is permissible. Use of deadly force may also be permissible to prevent the escape of individuals committed for up to 45 days for evaluations upon a finding of probable cause that the individuals are sexual predators. However, since this latter situation is a closer question than the former, I would suggest alternative means be explored to prevent escape without creating the potential need for deadly force.

Additionally, one final suggestion is that some thought should be given to seeking amendment of RCW 9A.16.040 to expressly include authority to prevent the escape of sexual predators from the SPP program. The statute currently provides, in pertinent part, that: "[h]omicide or the use of deadly force is justifiable . . . [t]o prevent the escape of *a person* from a federal or state correctional facility or in retaking a person who escapes from such a facility . . . ." RCW 9A.16.040(1)(c)(ii) (emphasis added). Arguably, a civilly-committed sexual predator who escapes from a correctional facility is "a person" within the meaning of this section just as would be a civilly-committed person transferred to SOC under RCW 72.68.032 and .035. However, to make the statute completely unambiguous as applied to such individuals, I suggest that after the word "person" a phrase be added, "including civilly-committed sexual predators."

I hope this information is of help to you. If I can be of further assistance, please do not hesitate to contact me. This memorandum contains my opinion only, and cannot be

construed as an official opinion of the Attorney General's Office.

JF/smw

[Filed March 11, 1994]

3/11/94

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In re the Detention of	) No. 90-2-21319-6
	)
ANDRE BRIGHAM YOUNG,	) FINDINGS OF FACT AND
	) CONCLUSIONS OF LAW
Respondent.	) ON RESPONDENT'S
	) MOTION TO DISMISS
	) BASED ON
	) UNCONSTITUTIONAL
	) CONDITIONS OF
	) CONFINEMENT AT SCC

This matter came before the undersigned judge for an evidentiary hearing on Respondent's motion to dismiss this action because of the alleged unconstitutional application of RCW 71.09 to the respondent by virtue of (1) the actual conditions of confinement of and 2) the nature and quality of treatment available to the Respondent at the Special Commitment Center. The evidentiary hearing on Respondent's motion took place from November 16 through December 15, 1993, during pre-trial proceedings in this case prior to the commencement of trial on remand from the Washington Supreme Court on the issue of least restrictive alternative on March 28, 1994.

The State of Washington appeared through Prosecuting Attorney Norm Maleng, represented by Timothy M. Blood. The Respondent appeared in person and through his attorneys of record, Robert Boruchowitz and Jennifer Shaw. The court heard the testimony of numerous witnesses, reviewed exhibits admitted into evidence, legal briefs and memoranda submitted by the parties, and considered the parties' oral arguments on February 3, 1994, and made the following:

FINDINGS OF FACT

1. Adjudged sexually violent predators (SVPs) like the Respondent, and individuals subject to pending petitions for civil commitment pursuant to RCW 71.09, reside in the Special Commitment Center (SCC), which is operated by the Department of Social and Health Services (DSHS) and housed wholly within a Department of Corrections (DOC) prison facility.

2. The SCC is a unit physically located within the DOC Special Offender Center (SOC) building in Monroe, Washington. The SOC building also separately houses, in one unit, mentally ill prisoners undergoing temporary treatment and stabilization and, in another unit, developmentally disabled prisoners. The average length of stay for prison inmates in the SOC is approximately six (6) months.

3. The physical layout for the SCC was designed for SOC prison use prior to the existence of the SCC. The SCC is operated by DSHS with DOC by written interagency agreement. Sharing a physical facility with the DOC under the terms of the interagency agreement requires SCC compliance with a number of DOC prison rules and regulations, some contact between SCC residents and DOC inmates, and dependence of the SCC on DOC for many necessary services to the operation of the SCC, including but not limited to shared use of the SOC law library and visiting rooms, DOC medical services, and use of DOC meal services. SCC residents' lives, like DOC inmates' lives, are affected by the SOC facility design, services and administrative policies.

4. The SCC uses resident monitoring equipment (for example, video and audio monitoring in all program rooms and audio monitoring in all resident rooms) which was installed in the facility by DOC for DOC use in a prison facility. SCC residents are frequently and may at any time be

monitored by SCC staff through use of such equipment, without the resident's knowledge.

5. Space limitations and some elements of the SOC facility design at the SCC are more restrictive for residents than for prison inmates in general DOC facilities which are not specifically designed for mentally ill offenders. Respondent has more restrictions on his freedom of movement in the SCC facility than he had during 17 years of custody with the DOC. The SCC unit is smaller than many DOC prison units.

6. The SCC is rated medium to close in terms of the facility's external (perimeter) security. SCC's internal security is provided by DSHS with back-up emergency services from DOC. SCC has called DOC staff for a "show of force" against SVP residents at least a half dozen times. SCC's entry security as well as its perimeter security is provided for by DOC. SCC residents, like DOC inmates, who may attempt to escape from a yard facility may be shot by DOC guards pursuant to a legal opinion provided by the Washington State Attorney General. SCC residents who have not yet been committed are not permitted to use the large yard.

6A. There is no resident security classification system at the SCC for the evaluation of the individual security needs and requirements for each resident, and there is no system in place for separating high risk residents from low risk residents. Such individual security classification systems are in place in most prison facilities.

7. Each SCC resident has his own personal sleeping and bathroom space, while most DOC inmates share such spaces with other inmates.

8. Space limitations and facility design at the SCC require both pre-commitment and post-commitment detainees to be housed together, despite recommendations by all treatment experts who testified in this hearing (and also

Dr. Quinsey in his written evaluation) that segregating these two groups of residents would further the treatment goals of the program.

9. Space limitations and facility design at the SCC require both residents undergoing treatment as well as those choosing not to participate in treatment to be housed together, despite recommendations by all treatment experts who testified in this hearing (and also Dr. Quinsey in his written evaluation) that segregating these two groups of residents would significantly further the treatment goals of the program.

10. DOC inmates in general are subjected to strip searches under broader circumstances than SVPs at the SCC. SCC residents like DOC inmates have been strip searched on a regular basis without reasonable suspicion after trips outside the SCC facility, even though residents have been under constant armed surveillance while gone. No contraband or weapons have been found in any strip searches of SCC residents since the opening of the SCC facility.

SVPs are subjected to room searches and recording of their telephone calls, only upon reasonable suspicion that the search is warranted in the interests of the health, safety, or security of SCC residents, staff or others. In contrast to SVPs, the majority of DOC inmates are also subjected to regular room searches and recording of their telephone calls, without reasonable suspicion.

11. Respondent was subjected to routine strip searches at the SCC both before and after every family visit, both before and after his commitment, and without reasonable suspicion, until this strip search policy was modified to require only routine patdown searches before and after family visits. Respondent was not permitted to hold hands with his wife during family visits in the SOC; he was not subject to such a restriction when he was in DOC prisons.

11A. When SCC residents are taken to a medical appointment out of the building, they are dressed in DOC overalls, they are taken in handcuffs and shackles, and they are strip searched when they return.

12. Strip searches of Respondent and other SCC residents were conducted by SCC forensic therapists and other unit staff, even though it is undisputed that use of residents' respective therapists to conduct such strip searches is incompatible with the treatment goals of the program because such practices can be harmful to establishing and maintaining a therapeutic relationship based on trust. The practice of including an individual resident's assigned therapist in strip searches of that resident was terminated on December 6, 1993, when the SCC Superintendent first learned, as a result of testimony in this hearing, that such a practice is inconsistent with the treatment goals of the program.

13. Formal grievance procedures are in place at all DOC facilities, which include but are not limited to providing prisoners with notice and definitions of infractionable offenses and the consequences for violations thereof, and the opportunity for a prompt hearing on any alleged infraction. The SCC has no such formal grievance procedures for its residents. As a result, there is the potential for arbitrary and inconsistent enforcement of rules on the unit.

14. SCC written policy dated August 6, 1991, provides that residents may be denied the right of worship, depending on their treatment plan. There was no testimony provided by treatment experts about whether or not denial or restrictions of a resident's freedom of worship would ever advance any individual's treatment plan at the SCC. SCC has made a professional judgment that it could be appropriate to deny or restrict a resident's freedom of worship if it conflicts with an individual's treatment plan.

15. Inmates in the DOC Twin Rivers treatment program for sex offenders and in some other DOC programs

have access to private trailer visits with their spouses and other family members. There has been no policy in place at the SCC since its commencement in 1990 defining the circumstances under which a resident may become eligible for such conjugal visits as part of his individual treatment program, despite the testimony of treatment experts (including consultants to the SCC as well as independent experts) that such conjugal and family visits may significantly enhance an individual sex offender's treatment program. Conjugal and extended family visits have not been permitted at SCC.

16. No transition, work-release, or aftercare program has been designed or implemented at the SCC, despite the expert opinion of SCC consultant Dr. Vernon Quinsey in 1992 that "the lack of any provision for aftercare and community supervision" is "a fatal problem with the special commitment program as it now stands." All treatment experts (including consultants to the SCC as well as independent experts) agreed that gradually reduced supervision of and well-defined conditions of eligibility for release from detention and an aftercare program for SVPs are fundamental and necessary component to any treatment program for this population.

17. The regulations for the SCC in WAC 275-155-050 do not, as a whole, provide a wider range of privileges for residents at the SCC than those to which DOC prison inmates are entitled, either in policy or practice. Access for a limited number of the SVPs in the SCC to personal use of a microwave, refrigerator, video games, and personal purchases of pizzas and other grocery items outside the facility for consumption at the SCC do not, in and of themselves, sufficiently distinguish the privileges available to residents at the SCC from those available to prison inmates. In many respects, the privileges and opportunities for residents at the SCC are less than those to which residents were entitled in DOC prison facilities (for example, law

library access, limitations on visiting hours, recreational opportunities).

18. The cognitive-behavioral treatment program designed for adjudged SVPs at the SCC has five components: (1) assessment and evaluation; (2) psychotherapy (group and individual); (3) psycho-educational modules; (4) assessment and modification of sexual arousal; and (5) a treatment milieu intended to encompass all aspects of the resident's environment in the facility.

19. The SCC treatment program design was created in consultation with a number of treatment experts, including those experienced in the treatment of prisoners who are subject to determinate sentences in prison facilities (specifically, the Twin Rivers program in the DOC and the Atascadero corrections program in California) as well as those experienced in the treatment of sex offenders who qualify for supervised outpatient treatment in the community.

20. None of the experts consulted by DSHS in the design of its treatment program at SCC had experience in either the design or actual treatment of adjudged SVPs subject to civil commitment of indeterminate duration in secure facilities like the SCC.

21. While some key elements of the treatment programs designed and in effect in both the DOC Twin Rivers prison facility and the Atascadero prison in California (used as a model for the SCC) are not included in the design of the SCC treatment program (for example, core relapse prevention groups led by either a clinical psychologist or psychiatric social worker, use of highly structured treatment manuals for all components of treatment, required attendance in therapy groups and psychosocial modules, significant employment opportunities, couples and family therapy, 12-step groups, mandatory pre-release classes and aftercare programs), DSHS has exercised professional judgment in the design of the SCC program.

22. While all five components of the SCC treatment program design are theoretically in place and available to residents, none of the five components of the SCC treatment program design has been fully implemented or is fully functioning at this time. For example, the only group therapy which has occurred took place for approximately one year or less (1992-1993), met for a maximum of three (3) hours per week, involved 5 residents at the most, was led by one forensic therapist who was not a psychiatrist, psychologist, psychiatric social worker or registered nurse, and was cancelled by staff because of the inability of the leader to manage the dynamics of the group. There has been a request for other therapy groups, but none had been started as of November 17, 1993. The consensus of all mental health experts testifying is that intensive group therapy is the most critical component of successful sex offender treatment programs, and group therapy is asserted by SCC staff to be the primary treatment modality at the SCC.

22A. SCC staff attribute the incomplete implementation of the treatment program design to most residents' choice not to participate in some or all of the program, for a variety of reasons cited by residents which include but are not limited to the following: lack of confidentiality in all individual and group therapy (evidence of all such participation can and must be provided to the court, notwithstanding WAC 275-155 which provided for residents' right to remain silent until 1993), lack of interest in various aspects of the treatment program, lack of confidence in treatment staff experience and skills, advice of legal counsel, infrequency and unavailability of psychosocial educational modules and therapy groups, lack of incentives and hope because of a perceived absence of a relationship between participation in treatment and release from commitment, absence of an aftercare or transition program for release to the community, staff inconsistency in applying

criteria for participation in various aspects of the treatment program, and resistance to treatment.

22B. All SCC staff believe that the fundamental reason that most committed SVPs are not engaged in aspects of treatment is because they all believe that it would disadvantage them from a legal perspective in their quest for release. This belief on the part of staff has played a role in the incomplete implementation of the treatment program design. Other reasons which have contributed to incomplete implementation of the treatment program by DSHS also include but are not limited to the small size of start-up program, limited resources, limited number of treatment staff qualified to teach certain psychosocial educational modules, staff inexperience in leading group therapy, staff deference to initiation of treatment by committed residents, and competing administrative demands on professional staff.

22C. While there are presently more treatment opportunities and programs in place for convicted sex offenders in the DOC Twin Rivers prison facility than there are in the DSHS facility at SCC for civilly committed SVPs, there are adequate and limited opportunities for residents to participate in sex offender treatment at the SCC.

23. Opportunities for resident employment, structured leisure activities, and education are less at the SCC than at either the DOC Twin Rivers facility or the Atascadero prison facility, whose prison treatment programs were the models for the design of the SCC treatment program. Such opportunities have not been shown to be less than those available in other DOC prison facilities. DSHS staff indicated that the small size of the SCC as a "start-up" program, budgetary constraints, and space limitations in the existing facility have been administrative constraints on establishing such programs and opportunities for residents who are civilly committed to the SCC for an indeterminate term.

24. There is no formal grievance procedure at the SCC comparable to that in place at all DOC prison facilities, which procedures define specific behavior for which residents may be subject to discipline, and the specific consequences to be applied uniformly to such violations. While DSHS staff has exercised professional judgment in its determination that having such rules and regulations and grievance procedures are at odds with the treatment goals of the SCC, the absence of the same has contributed to staff discipline of residents which is at times arbitrary and inconsistent.

25. The staff at the SCC who are directly and indirectly involved in the treatment of SVPs does not include any state-certified (pursuant to SSOSA, the Special Sex Offender Sentencing Alternative) sex offender treatment providers. The only staff person who has sufficient professional experience to be so qualified is the Superintendent, who is not directly involved in providing any treatment to SVPs, whose office is in a trailer outside the SCC residence, and who rarely spends any time on the unit. There is a part-time psychiatrist available to prescribe medications for a few residents and who is not otherwise engaged in treatment of residents. There is one psychologist on staff, who was unlicensed and had no experience working with sex offenders when she was initially hired at the SCC, and subsequently became licensed approximately one year later. The psychologist spends approximately 70 percent of her time preparing evaluations of pre- and post-commitment residents for court proceedings; she is not directly engaged in conducting group or individual therapy to committed residents.

26. The staff most directly involved in the treatment milieu and management of the SVPs are employees classified as forensic therapists and psychiatric security attendants, whose relevant work experience prior to employment at the SCC consists primarily of work in DOC

prison institutions. All staff have received training in aspects of the treatment program designed for SVPs since their employment at the SCC. While the forensic therapists who have primary responsibility for providing individual therapy to residents and are expected to conduct group therapy when it occurs are not psychologists, psychiatrists, psychiatric social workers or registered nurses, they receive some supervision from and have been trained by qualified psychologists who are consultants with the SCC. There is no treatment manual to define the structure and management of group or individual therapy, even though most staff expected to provide direct treatment to residents are not psychologists, psychiatrists, psychiatric social workers or registered nurses. The treatment responsibilities of the PSAs are not clearly delineated.

27. Respondent's assigned therapist, Norm Nelson, who has a job classification of forensic therapist 2 is not a psychologist, a psychiatric social worker, or a registered nurse.

28. SCC have verbally abused residents, including the Respondent, on a number of occasions by deriding both their status ("rapo," "pervert" and "fucking punk") and their race ("niggers," "nigger lawyer," "sand niggers," "sand monkeys"). On one occasion, a psychiatric security attendant (PSA) mimicked a Native American dance in front of a Native American resident. Such derogatory and racist comments and behavior are inconsistent with the treatment purpose of civil commitment at the SCC.

29. There is a "level" system in place at the SCC which provides for tier assignments of residents on the unit and for restricted access of some residents to the microwave, refrigerator, silos, weight room and pool table. It is possible that residents could be placed on diferent [sic] levels for the same behavior. There is no treatment rationale for the current level system.

30. Respondent has been brought to and from court for this hearing in handcuffs, accompanied by one or two armed King County Jail officers. He is held in the King County Jail overnight during court hearings. There is no segregation of SCC detainees from jail inmates in the King County Jail.

Based on the foregoing Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

1. The Respondent has a due process right to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish. The Respondent has a due process right to treatment for the mental health condition for which he has been involuntarily committed by the State.

1A. The burden of proof for purposes of this motion is on the Respondent to prove beyond a reasonable doubt that the actual conditions of his confinement and the actual nature and quality of treatment available to him at the SCC pursuant to RCW 71.09 violate his substantive due process rights.

2. Notwithstanding the liberty interests of the Respondent at issue, the State does not have the burden of proving that the actual conditions of his confinement and the nature and quality of treatment available to him at the SCC either bears some reasonable relationship to the civil purposes of the statute (incapacitation and treatment) or that the Respondent is being afforded more considerate treatment and conditions of confinement at the SCC than criminals whose conditions of confinement are designed to punish.

3. This court cannot consider whether the actual conditions of Respondent's confinement pursuant to RCW 71.09 manifest a criminal purpose to this statutory scheme which has been held to be civil in purpose and facially valid

by the Washington Supreme Court [*In re Young*, 122 Wn.2d 1 (1993)].

4. RCW 71.09.060 authorizes Respondent's detention in a facility within the following parameters: (1) a secure facility for control, care, and treatment operated by the department of social and health services; (2) the facility shall not be located on the grounds of any state mental facility or regional habilitation center because such institutions are insufficiently secure for this population; and (3) confinement may be in a mental health facility located wholly within a correctional institution pursuant to RCW 10.77.220.

5. Because the approved statutory scheme authorizes detention of Respondent in a secure mental health facility located wholly within a correctional institution, the Respondent has been unable to sustain his burden of proving beyond a reasonable doubt that his detention in the SCC facility, which is both physically located within and physically designed for a Department of Corrections prison facility, violates his substantive due process rights.

6. Because compliance with DOC rules and regulations is implicit in the approved statutory scheme authorizing detention of the Respondent in the SCC located within and designed for a DOC prison facility, the Respondent has been unable to sustain his burden of proving beyond a reasonable doubt that the application of many DOC institutional rules, regulations and restrictions to the SCC facility (either pursuant to the DOC/SCC joint operating agreement or SCC administrative decisions) violates his substantive due process rights.

7. Notwithstanding the Respondent's proof by a preponderance of the evidence that some of the DSHS administrative policies and/or practices in effect at the SCC facility are or have been incompatible with the treatment purposes of the Respondent's civil commitment (for example, the strip searches of a resident by his assigned therapist), the Respondent has failed to prove beyond a

reasonable doubt that the DSHS administrative policies and practices, as a whole, which are in effect at the SCC violate his substantive due process rights.

8. Notwithstanding the Respondent's proof by a preponderance of the evidence that some of the DSHS administrative policies and/or practices in effect at the SCC facility have not afforded the Respondent more considerate treatment and conditions of confinement than those in effect for DOC prison inmates (for example, the absence of procedural due process for alleged violations of SCC residential rules and regulations), the Respondent has failed to prove beyond a reasonable doubt that the DSHS administrative policies and practices, as a whole, which are in effect at the SCC violate his substantive due process rights.

9. Development and implementation of a structured, well-defined SCC program for transition, work-release and aftercare for committed residents is not prohibited by RCW 71.09. The absence of a transition, work-release, and aftercare program by the SCC for an individual in treatment at the SCC is incompatible with the treatment goals of the program and is a substantial departure from accepted professional judgment and practice.

10. DSHS has exercised reasonable professional judgment in the design of the cognitive-behavioral treatment program for SVPs who are subject to civil commitment of indeterminate duration in secure facilities pursuant to RCW 71.09 at the SCC.

11. Given the presumption of correctness of all decisions of DSHS regarding the SCC treatment program design and implementation, coupled with the Respondent's burden of proving beyond a reasonable doubt that the treatment program, as a whole, both by design and in practice (1) is incompatible with the treatment goals of the program and (2) does not constitute an exercise of reasonable

professional judgment by DSHS, the Respondent's motion to dismiss must be denied.

DATED this 11th day of March, 1994.

/s/Harriett M. Cody
JUDGE HARRIETT M. CODY

Approved as to form only:

/s/Tim M. Blood
TIMOTHY M. BLOOD, WSBA #14004
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner State of Washington

Approved as to form:

/s/Robert C. Boruchowitz
JENNIFER SHAW, WSBA #17308
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Attorney for Respondent Andre Brigham Young

[Filed June 6, 1994]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD G. TURAY,	)	NO. C91-664WD
	)	
Plaintiff,	)	ORDER AND
v.	)	INJUNCTION
	)	
DAVID B. WESTON, et al.,	)	
	)	
Defendants.	)	

The plaintiff has moved for injunctive relief based on the jury's finding that defendants Weston and Dehmer deprived him of his constitutional right of access to mental health treatment. All materials filed in support of or opposition to the motion, and the evidence received at trial, have been fully considered.

Plaintiff Richard Turay is confined as a "sexually violent predator" by the State of Washington pursuant to RCW ch. 71.09, a civil commitment statute. Plaintiff alleges in this lawsuit that the conditions of his confinement at the Special Commitment Center ("SCC") at Monroe, Washington, have violated his civil rights. He contends that his rights have been violated by overly restrictive policies regarding security, physical movement, visitation, and mail; by the defendants' failure to provide him with adequate mental health treatment and with educational, vocational, exercise, and recreational opportunities; and by certain defendants having subjected him to an unlawful probe search.

The defendants are David Weston, superintendent of the SCC; William Dehmer, program director; Norman Nelson, forensic therapist; John Anderson-Taylor, forensic

therapist; Steven Wahl, psychiatric security attendant; Andre Simon, psychiatric security attendant; and Joan Kirchoff, former forensic therapist.

Plaintiff has not challenged in this case the constitutionality of RCW ch. 71.09, nor the legality of his confinement; the suit relates only to conditions of confinement.

This case was tried to a jury March 16-28, 1994. On March 28, the jury returned its verdict finding that defendants Weston and Dehmer had denied plaintiff access to constitutionally adequate mental health treatment. On two claims relating to visitation the jury was unable to reach agreement; these were submitted to the court by stipulation, and the court found for the defendants. The jury also was unable to agree on the probe search claim, which will be retried to a different jury. In the March 28 verdict, the jury found for the defendants on all other claims.

The Fourteenth Amendment Due Process Clause of the United States Constitution requires state officials to provide a civilly-committed person, such as the plaintiff, with access to mental health treatment which gives him a realistic opportunity to be cured or to improve the mental condition for which he was confined. *See Youngberg v. Romeo*, 457 U.S. 307, 319-22 (1982); *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir. 1980). Continued confinement without access to mental health treatment, as required by the Constitution, would result in irreparable harm to the plaintiff. Given the verdict of the jury, and the findings set out below, the plaintiff is entitled to injunctive relief narrowly tailored to remedy this constitutional violation.

With respect to the provision of mental health treatment, the evidence submitted at trial established, and the court finds as facts, the following:

1. The jury's finding that defendants Weston and Dehmer have failed to provide plaintiff with access to mental

health treatment which gives him a reasonable opportunity to be cured, or to improve, is adopted for purposes of this order and injunction.

2. "Sexually violent predators", as defined by RCW 71.09.020, are a difficult population to treat therapeutically, requiring specialized treatment expertise and modalities.

3. A person civilly-committed under Washington's sexually violent predators law, RCW ch. 71.09, will not be released from secure confinement until a determination is made that his mental abnormality or personality disorder has so changed that he is not likely to commit predatory acts of sexual violence if released. RCW 71.09.090.

4. For the most part, treatment staff at SCC are inexperienced in the treatment of sex offenders.

5. The training of staff in this area has been developed ad hoc, and has consisted mostly of lectures.

6. Until recently, no clinical psychologist or psychiatrist was regularly available to the treatment staff for consultation or supervision of therapy programs.

7. Treatment plans with objective measures of progress have not been developed for individuals confined in the program. As a result, it is difficult for either the resident or the staff to know if the individual is improving and in what ways.

8. Trust is an important element in a therapeutic relationship, yet trust and rapport between therapy staff and persons confined at SCC has remained very low, partly because of deficiencies in the program.

9. Treatment staff have verbally abused residents and have performed strip searches of residents.

10. The failure of the program to meet constitutional standards to date has contributed to a belief by residents that they have no chance of ever qualifying for release, i.e., that their confinement amounts to a life sentence.

Based on the foregoing, the defendants Weston and Dehmer, in their official capacities, are hereby enjoined as follows:

A. To adopt and implement a plan for initial and ongoing training and/or hiring of competent sex offender therapists at SCC.

B. To implement strategies to rectify the lack of trust and rapport between residents and treatment-providers.

C. To implement a treatment program for residents which includes all therapy components recognized as necessary by prevailing professional standards in comparable programs where participation is coerced. As agreed to by defendants, this shall include the involvement of spouses and family members in the treatment of residents, and plans for encouraging the visitation and support of family members.

D. To develop and maintain individual treatment plans for residents that include objective benchmarks of improvement so as to document, measure, and guide an individual's progress in therapy.

E. To provide a psychologist or psychiatrist expert in the diagnosis and treatment of sex offenders to supervise the clinical work of treatment staff, including monitoring of the treatment plans of individual residents, and to consult with staff regarding specific issues or concerns about therapy which may arise.

Defendant Weston shall file and serve on plaintiff and his counsel by July 20, 1994, a report describing the steps taken to satisfy the terms of this injunction. Plaintiff's counsel may submit any objections to the report no later than

July 27, 1994. After court review of the report and objections, if any, a further order will be issued.

The clerk is directed to send copies of this order to all counsel of record.

Dated: June 3, 1994.

/s/William L. Dwyer
William L. Dwyer
United States District Judge

Hon. Magistrate Judge Philip K. Sweigert

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON

ANDRE BRIGHAM YOUNG, Petitioner, vs. DAVID WESTON, Superintendent of the Special Commitment Center, and STATE OF WASHINGTON, Respondents	) No. C 94-480C) AMENDED PETITION) FOR WRIT OF HABEAS) CORPUS)) (28 U.S.C. Sec. 2254)

ANDRE BRIGHAM YOUNG, the petitioner herein, is confined at the Special Commitment Center, a maximum security facility staffed by the Department of Social and Health Services of the State of Washington and located within a prison building operated by the Department of Corrections of the State of Washington in Monroe, Washington. He seeks a writ of habeas corpus.

1. Name and Location of Court which entered the judgment of conviction under attack.

King County Superior Court, Seattle, Washington 98104; Supreme Court of Washington, Temple of Justice, Olympia, Washington 98504.

2. Date of judgment: March 8, 1991; August 9, 1993, Washington Supreme Court opinion.

3. Length of incarceration: indefinite.

4. Nature of offense involved: Petition for involuntary commitment under RCW 71.09 (commitment of persons as "sexually violent predator").

5. What was your plea? Mr. Young denied the accusations against him. There is no formal plea process under RCW 71.09.

6. Type of trial: Jury.

7. Did you testify at the trial? No.

8. Did you appeal from the judgment? Yes

9. a. Name of Appellate Court: Washington Supreme Court.

b. Result: Washington Supreme Court found several constitutional violations in the trial, one harmless error in admission of evidence, and remanded for trial on the question of whether a less restrictive alternative is appropriate.

c. Date and citation: August 9, 1993, *In re Young*, 122 Wash.2d. 1 (1993).

d. Grounds raised: The petitioner raised approximately 30 constitutional and evidentiary issues, including substantive and procedural due process violations, double jeopardy violations, equal protection violations, and *ex post facto* violations.

e. and f. Higher state court or United States Supreme Court: The Washington Supreme Court is the highest state court. The petitioner has not sought certiorari in the United States Supreme Court.

10 & 11: Other than a direct appeal from the judgment, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

The petitioner filed a personal restraint petition in the Washington Supreme Court before trial in state court; the Court accepted the petition and consolidated it with the petitioner's direct appeal. The petitioner, *pro se*, sought habeas corpus relief in the United States District Court for the Western District of Washington during the pendency of the state court proceedings, challenging the constitutionality

of the proceeding. The petition was dismissed without prejudice for failure to exhaust state remedies.

12. State concisely every ground on which you claim that you are being held unlawfully.

The petitioner has been committed indefinitely to a maximum security facility within a prison, based on a finding that he is "likely to engage in predatory acts of sexual violence" based on a combination of a "mental abnormality" and a "personality disorder not otherwise specified." He was denied basic substantive and procedural due process rights required by constitutional due process provisions and equal protection rights accorded to persons in traditional civil commitment proceedings. In addition, he was subjected to additional punishment for the offense on which he had completed serving a prison sentence, thereby violating both double jeopardy and *ex post facto* protections.

A. Indeterminate commitment under RCW 71.09 amounts to unconstitutional preventive detention. It violates Fourteenth Amendment substantive due process rights by committing for "treatment" persons who are not mentally ill and who have committed no criminal act since their imprisonment.

B. The statute violates Fourteenth Amendment substantive due process requirements because the state has not eschewed all interest in punishment and a petition for commitment under RCW 71.09.030(1) cannot be instituted until the sentence of a respondent is about to expire or has expired.

C. The Statute violates Fourteenth Amendment procedural due process because it does not require constitutionally adequate evidence of dangerousness and because it does not require the recent commission of a sexual crime or any other behavior or act that shows some objective measure of dangerousness before someone can be committed as a "sexually violent predator".

D. The decision of the Washington Supreme Court in *In re Young*, 122 Wash. 2d 1 (1993) compounds the problems of the statute and violates Fourteenth Amendment equal protection rights as it requires the proof of a recent overt act for cases involving respondents who have been released from prison but not for those who still are in prison.

E. RCW 71.09 violates Fourteenth Amendment equal protection rights because the procedures and standards used to commit prisoners as "sexually violent predators" are not substantially equivalent to those provided mentally disordered citizens whose commitment is sought under other statutes, specifically RCW 71.05. In addition to not requiring a recent overt act, there is no right to remain silent in RCW 71.09 as there is in RCW 71.05.

F. The Statute is vague and violates Fourteenth Amendment procedural due process because it fails to provide constitutionally adequate guidance to mental health evaluators and fact-finders for determining whether someone is a "sexually violent predator".

G. The statute violates Fourteenth Amendment procedural due process because it requires that the state prove only that an accused is "likely to engage in predatory acts of sexual violence" if released; this does not constitute a true "beyond a reasonable doubt" standard.

H. The application of the Statute in Mr. Young's case violated his Fourteenth Amendment and Fifth Amendment right against self-incrimination because the Court allowed his uncounseled statements and his silence to be used as evidence to obtain an indeterminate commitment.

I. The Statute violates the prohibition in U.S. Const. Art. I, Sec. 10 against *ex post facto* laws because it retrospectively subjects an individual to indeterminate commitment for criminal acts committed prior to the Statute's enactment.

J. The Statute violates the prohibition against double jeopardy in U.S. Const. Fifth and Fourteenth Amendments because it subjects an individual to additional punishment for a crime after he has completed his prison sentence imposed by a judge.

K. The trial court violated Mr. Young's Fourteenth Amendment due process right to a fair trial by permitting the state's proferred [sic] expert testimony by a psychologist that Mr. Young suffered from a mental abnormality that made him likely to engage in predatory acts of sexual violence. The psychologist also testified as to his opinion on the ultimate issue before the jury, that Mr. Young was a "sexually violent predator". The opinion of the witness as to a matter of law was beyond his competence. His testimony was unreliable, and scientifically invalid, as it was not based on personal observation or interview and constituted the application of a new psychological theory not recognized in scientific literature. The state offerred [sic] no evidence of any consensus in the scientific community supporting that theory, and the defense showed that the consensus of the scientific community does not support the theory. This testimony rendered the trial fundamentally unfair.

L. Mr. Young was denied his Sixth Amendment right to confrontation and his Fourteenth Amendment due process right to a fair trial when the state's expert was allowed to relate hearsay opinions and conclusions that were contained in the historical records he reviewed.

M. The Washington Supreme Court committed constitutional error in finding that it was harmless error for the trial court to allow the state to present evidence of Mr. Young's 1972 misdemeanor bomb threat conviction. The introduction of that irrelevant and prejudicial evidence denied him his Fourteenth Amendment due process right to a fair trial.

N. The trial court committed constitutional error in admitting evidence of Mr. Young's 1963 Pierce County convictions because the jury instructions which led to those convictions erroneously defined the presumption of innocence (using an instruction ruled invalid by the Ninth Circuit years earlier), impermissibly commented on the evidence, and shifted the burden of proof to Mr. Young on the issue of alibi. These were violations of the Fourteenth Amendment due process right to a fair trial.

O. It was constitutional error to give the 1963 reasonable doubt and presumption of innocence instruction to the 1991 jury, because those instructions were unlawful and because the 1991 jury received a separate instruction on reasonable doubt and none on presumption of innocence. These were violations of the Fourteenth Amendment due process right to a fair trial.

P. Because the state cross-examined a defense witness about knowledge concerning the "fact" that Mr. Young had lost all of his appeals, the trial court denied Mr. Young his Fourteenth Amendment due process right to a fair trial in precluding defense evidence that Mr. Young's challenge to his 1963 convictions was still on appeal.

Q. When the defense moved for discovery of any prior criminal record of all state's witnesses, and the defense investigator asked the two police witnesses if they had been charged with a crime or any misconduct, and they answered negatively, and the state disclosed nothing concerning misconduct or criminal behavior, and after the police testified a reporter advised the defense that both officers had been demoted during their career for alleged misconduct and one had been convicted of a crime, the trial court denied Mr. Young his Fourteenth Amendment due process right to a fair trial when it prevented the defense from presenting the evidence of the misconduct and criminal behavior.

R. The court denied Mr. Young his Fourteenth Amendment due process right to a fair trial by admitting the

1963 convictions because they were more prejudicial than probative.

S. The court denied Mr. Young his Fourteenth Amendment due process right to a fair trial by giving jury instruction No. 13, which instructed the jury that the crime of rape in 1962 was a crime of sexual violence, permitting the jury to find that an element of the "predator" charge had been proven based on an unlawful conviction not alleged in the petition.

T. The Statute requires proof of either a mental abnormality or a personality disorder that makes an accused likely to reoffend but the state only presented evidence on a combination of a mental abnormality and personality disorder. The evidence was insufficient and the petition should have been dismissed, as Mr. Young was denied his Fourteenth Amendment due process right to a fair trial.

U. Because of the severity of the deprivation of liberty resulting from a "predator finding", recognized by the Statute's requirement of proof beyond a reasonable doubt, it was a denial of Fourteenth Amendment due process not to instruct the jury that Mr. Young was presumed not to be a "sexually violent predator".

V. The trial court denied Mr. Young his Fourteenth Amendment due process right to a fair trial when it excluded testimony by the defense expert on the ground that non-disclosure of certain areas of testimony violated discovery deadlines.

W. The cumulative effect of the constitutional errors identified in Sections J, K, L, M, N, O, P, Q, R, S, T, U, and V above taken together denied Mr. Young his Fourteenth Amendment due process right to a fair trial.

13. These grounds were presented in the Washington Supreme Court.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? No. The petitioner has an appeal pending in the Washington Court of Appeals not attacking the judgment at issue here, but addressing the application in King County Superior Court of the Supreme Court's decision relating to the hearing on less restrictive alternative and probable cause requirements, and challenging his conditions of confinement as being punitive.

15. Give the name and address of each attorney who represented you in the following stages of the judgment attacked herein:

Preliminary hearing, trial, appeal: Annie Engelhard and Robert C. Boruchowitz, with William Salen, James Doerty, Jennifer Shaw, Leslie Garrison, The Defender Association, 810 Third Avenue, Seattle, Washington 98104.

16. Were you sentenced on more than one count? Not applicable.

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? No.

Wherefore, petitioner prays that the Court grant petitioner immediate release from custody and other relief to which he may be entitled in this proceeding.

/s/Robert C. Boruchowitz
Robert C. Boruchowitz
WSBA No. 4563
Attorney Representing Mr. Young

Date: September 14, 1994

I declare under penalty of perjury that the foregoing is true and correct. Executed on

September 14, 1994.
Date

/s/Andre Brigham Young
Signature of Petitioner

The Defender Association
810 Third Avenue No. 800
Seattle, Washington 98104
206 447 3900 Ext. 603

[Filed November 7, 1994]

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

In re the Detention of	)
	) NO. 93-2-15348-1
ELMER CAMPBELL	)
	) FINDINGS OF FACT,
	) CONCLUSIONS OF LAW
	) AND ORDER ON
	) RESPONDENT'S MOTION
	) TO DISMISS BASED ON
	) UNCONSTITUTIONAL
	) CONDITIONS OF
	) CONFINEMENT AT
	) SPECIAL COMMITMENT
Respondent.	) CENTER

This matter came before the court on July 1, 1994, and July 29 of 1994, on Respondent's motion to dismiss this action. Respondent argues that RCW 71.09 is unconstitutional as applied to him due to (a) punitive conditions of confinement and (b) inadequate treatment made available to him at the Special Commitment Center.

The State of Washington appeared through Deputy Prosecuting Attorneys Carol Spoor and Michael Lang. Respondent appeared in person and through his attorneys, Bernadette Foley and David Hirsch. In accordance with its earlier ruling, the Court adopted the seventeen volume factual record generated in a similar hearing on Motion to Dismiss in *In re the Detention of Andre B. Young*, King County Cause No. 90-2-21319-6, heard before the Hon. Harriet Cody of this Court from November 16 to December 15, 1993. The parties supplemented this record with testimony of witnesses, exhibits, legal briefs and memoranda, the ruling entered by United States District Court Judge William Dwyer in *Turay*

v. Weston, No. C91-66WD [sic] (W.D.Wa.), and oral arguments by counsel, all of which have been considered by the Court.

The Court makes the following:

FINDINGS OF FACT

1. Respondent is detained at the Special Commitment Center (SCC) as an adjudged sexually violent predator (SVP) under RCW 71.09.

2. SCC is operated by the Department of Social and Health Services, but is housed entirely within the Special Offender Center (SOC), a Department of Corrections prison facility in Monroe, Washington. The SOC building also houses, in separate units, mentally ill prisoners undergoing temporary treatment, and developmentally disabled prisoners.

3. The SCC facility was designed as a prison prior to the existence of the SCC. The SCC is operated by DSHS with DOC by written interagency agreement. Sharing a physical facility with the DOC under the terms of the interagency agreement requires SCC compliance with a number of DOC prison rules and regulations, some contact between SCC residents and DOC inmates, and dependence of the SCC on DOC for many services necessary to the operation of the SCC, including but not limited to shared use of the SOC law library and visiting rooms, DOC medical services, and use of DOC meal services. SCC residents' lives, like DOC inmates' lives, are affected by the SOC facility design, services and administrative policies.

4. The SCC uses resident monitoring equipment (for example, video and audio monitoring in all program rooms and audio monitoring in all resident rooms) which was installed in the facility by DOC for DOC use in a prison facility. SCC residents are frequently and may at any time be monitored by SCC staff through use of such equipment, without the resident's knowledge.

5. Space limitations and some elements of facility design at the SCC are more restrictive for residents than for prison inmates in DOC facilities which are not specifically designed for mentally ill offenders. The austerity and small size of the SCC facility add to the sense of physical oppressiveness.

6. The SCC is rated medium to close in terms of the facility's external (perimeter) security. SCC's internal security is provided by DSHS with back-up emergency services from DOC. SCC has called DOC staff for a "show of force" against SVP residents at least a half dozen times. SCC's entry security as well as its perimeter security is provided by DOC. SCC residents, like DOC inmates, who may attempt to escape from a yard facility may be shot by DOC guards pursuant to a legal opinion provided by the Washington State Attorney General. SCC residents who have not yet been committed are not permitted to use the large yard.

7. SCC implemented a three level resident security classification system for residents in July 1994. The level system restricts access of some residents to the microwave, refrigerator, outdoor "silos", weight room, and recreational equipment, as well as personal hygiene items. Although the classification system purports to measure the inmate's security risk, it includes non-relevant factors such as an inmate's commitment to the treatment program and participation in group activities. Because the classification includes factors unrelated to security, it lacks a security rationale. Similarly, because it does not relate to or promote treatment goals, it lacks a treatment rationale. The criteria for placement in the Basic and Intermediate levels are vague. Residents could be and have been placed on different levels for the same behavior. Classification under the level system is therefore arbitrary.

8. Each SCC resident has his own personal sleeping and bathroom space, while most DOC inmates share such spaces with other inmates.

9. Pre-commitment and post-commitment detainees are housed together, despite recommendations by all treatment experts who testified at the *Young* hearing (and also Dr. Quinsey in his written evaluation) that segregating these two groups of residents would further the treatment goals of the program.

10. Residents undergoing treatment as well as those choosing not to participate in treatment are housed together, despite recommendations by all treatment experts who testified in the *Young* hearing (and also Dr. Quinsey in his written evaluation) that segregating these two groups of residents would significantly further the treatment goals of the program.

11. All SCC residents are subjected to stringent security procedures even though not all of the offenders present such a security risk. Respondent, however, has failed to present evidence that he should be subject to a lower level of security. Residents are observed when they go to the bathroom, sometimes by female staff. Residents are strip-searched without reasonable suspicion any time they leave and return to the SOC-SCC facility, even for medical appointments and even though they are under constant armed surveillance while gone. At least twice, residents have had their clothes torn off for refusing to cooperate with a strip search. They are patted down whenever they use the "large yard", after every visit and whenever they leave the unit for some other part of the building. No contraband or weapons have ever been found in any such strip search since the opening of the facility. Residents are shackled and hand-cuffed any time they leave the facility, even though they are under constant armed guard. Residents are chained when they are transported to the courts.

While SCC administration asserts that residents' rooms are searched only on reasonable suspicion, all residents' rooms have been searched upon discovery that a staff member's keys were missing. There was no reason to suspect any of the residents had stolen them. No keys were found.

12. Strip searches of Respondent and other SCC residents were conducted by SCC forensic therapists and other unit staff, even though it is undisputed that use of residents' respective therapists to conduct such strip searches is incompatible with the treatment goals of the program because such practices can be harmful to establishing and maintaining a therapeutic relationship based on trust. The practice of including an individual resident's assigned therapist in strip searches of that resident was terminated on December 6, 1993, when the SCC Superintendent first learned, as a result of testimony in the *Young* hearing, that such a practice is inconsistent with the treatment goals of the program.

13. Formal grievance procedures are in place at other DOC facilities, which include but are not limited to providing prisoners with notice and definitions of infractionable offenses and the consequences for violations thereof, and the opportunity for a prompt hearing on any alleged infraction. The SCC has no such formal grievance procedures for its residents. As a result, there has been arbitrary and inconsistent enforcement of rules on the unit. Dr. Nancy Steel [sic], an expert in the custodial treatment of sex offenders, testified that inconsistent enforcement of rules is cruel.

14. Inmates in the DOC Twin Rivers treatment program for sex offenders and in some other DOC programs have access to private trailer visits with their spouses and other family members. There has been no policy in place at the SCC since its commencement in 1990 defining the circumstances under which a resident may become eligible

for such conjugal visits as part of his individual treatment program, despite the testimony of treatment experts (including consultants to the SCC as well as independent experts) that such conjugal and family visits may significantly enhance an individual sex offender's treatment program. Conjugal and extended family visits have not been permitted at SCC. There is no evidence that SCC residents had engaged in inappropriate behavior during conjugal visits while at DOC.

15. No transition, work-release, or aftercare program has been designed or implemented at the SCC, despite the expert opinion of SCC consultant Dr. Vernon Quinsey in 1992 that "the lack of any provision for aftercare and community supervision" is "a fatal problem with the special commitment program as it now stands". All treatment experts (including consultants to the SCC as well as independent experts) agreed that gradually reduced supervision of and well-defined conditions of eligibility for release from detention and an aftercare program are a fundamental and necessary component to any treatment program for this population.

16. The regulations for the SCC in WAC 275-155-050 do not, as a whole, provide a wider range of privileges for residents at the SCC than those to which DOC prison inmates are entitled, either in policy or practice. Access for a limited number of the SVPs in the SCC to personal use of a microwave, refrigerator, video games, and personal purchases of pizzas and other grocery items outside the facility for consumption at the SCC do not, in and of themselves, sufficiently distinguish the privileges available to residents at the SCC from those available to prison inmates. In many respects, the privileges and opportunities for residents at the SCC are less than those to which residents were entitled in DOC prison facilities (for example, limited law library access, shorter visiting hours, fewer vocational, educational and recreational opportunities).

17. The cognitive-behavioral treatment program designed for adjudged SVPs at the SCC has five components: (1) assessment and evaluation; (2) psychotherapy (group and individual); (3) psycho-educational modules; (4) assessment and modification of sexual arousal; and (5) a treatment milieu intended to encompass all aspects of the resident's environment in the facility.

18. The SCC treatment program design was created in consultation with a number of treatment experts, including those experienced in the treatment of prisoners who are subject to determinate sentences in prison facilities (specifically, the Twin Rivers program in the DOC and the Atascadero corrections program in California) as well as those experienced in the treatment of sex offenders who qualify for supervised outpatient treatment in the community.

19. None of the experts consulted by DSHS in the design of its treatment program at SCC had experience in either the design or actual treatment of adjudged SVPs subject to civil commitment of indeterminate duration in secure facilities like the SCC.

20. Key elements of the treatment programs designed and in effect in both the DOC Twin Rivers prison facility and the Atascadero prison in California (used as a model for the SCC) are not included in the design of the SCC treatment program, for example, core relapse prevention groups led by either a clinical psychologist or psychiatric social worker, use of highly structured treatment manuals for all components of treatment, required attendance in therapy groups and psychosocial modules, significant employment opportunities, couples and family therapy, 12-step groups, mandatory pre-release classes and aftercare programs.

21. While all five components of the SCC treatment program design are theoretically in place and available to residents, only parts of the SCC treatment program have been fully implemented or are fully functioning at this time. For example, the only group therapy

which has occurred took place for approximately one year or less (1992 - 1993), met for a maximum of three (3) hours per week, involved 5 residents at the most, was led by one forensic therapist who was not a psychiatrist, psychologist, psychiatric social worker or registered nurse or a certified sex offender treatment provider, and was cancelled by staff because of the inability of the leader to manage the dynamics of the group. A core group was reinstituted after the *Young* hearing, but the leader, a licensed psychologist, is not a certified sex offender treatment provider. Few of the psycho-educational modules have been offered, and arousal reconditioning has only recently begun for four residents.

22. The consensus of all mental health experts testifying in the *Young* hearing is that intensive group therapy is the most critical component of successful sex offender treatment programs, and group therapy is asserted by SCC staff to be the primary treatment modality at the SCC. Yet a number of residents, including committed residents, have been denied admission to the therapy group and have been admitted only into "pre-group", which does not address sex-offense treatment issues. At least one committed resident has been denied admission to the group on the grounds that he has not proved his good faith interest in treatment. Residents are allowed into group therapy only after complete assessments. According to expert testimony at the *Young* hearing, this policy is punitive and counterproductive. The same expert criticized SCC's policy of admitting only residents who had admitted their crimes into group therapy.

23. There are no state certified sexual offender treatment providers on the SCC staff. The only staff member with sufficient expertise to become certified is the Superintendent, who is not directly involved in treatment, whose office is in a trailer outside the facility, and who spends less than three hours per week on the unit. The Program Director had no training or experience in sexual deviancy treatment before being hired by SCC in 1990.

While there is a part-time psychiatrist available, he prescribes medicine for a few residents, assists in psychiatric assessments, and participates in treatment team meetings. He is not otherwise involved in sex offender treatment. Until very recently, the only staff psychologist at SCC was unlicensed and had no experience working with sex offenders when she was hired. She spends approximately seventy percent of her time preparing evaluations. SCC has recently hired a second staff psychologist, who co-leads the core treatment group. A neuropsychologist provides neuropsychological evaluations and treatment recommendations less than two hours per month. Three experienced treatment providers are available for staff consultation but do not provide treatment. A forensic therapist hired in February 1994 to provide direct treatment has recently left the program.

24. The staff members most directly involved in the treatment milieu and management of residents are employees classified as forensic therapists (FTs) and psychiatric security attendants (PSAs), whose relevant experience consists largely of work in DOC prison institutions. The FTs have primary responsibility for providing individual therapy to residents, yet none of them are psychologists, psychiatrists, psychiatric social workers or nurses. They are not provided with a treatment manual; indeed, none exists. The treatment responsibilities of the PSAs are not clearly defined. The PSAs are untrained in sex offender treatment, yet are charged with the responsibility of deciding which sexually explicit materials may be given to SVP's [sic], a judgment which is critical in the resident's deviancy treatment.

25. SCC staff attribute the incomplete implementation of the treatment program design to most residents' choice not to participate in some or all of the program, for a variety of reasons cited by residents which include but are not limited to the following: lack of

confidentiality in all individual and group therapy (evidence of all such participation can and must be provided to the court, notwithstanding WAC 275-155 which provided for residents' right to remain silent until 1993), lack of interest in various aspects of the treatment program, lack of confidence in treatment staff experience and skills, advice of legal counsel, infrequency and unavailability of psychosocial educational modules and therapy groups, lack of incentives and hope because of a perceived absence of a relationship between participation in treatment and release from commitment, absence of an aftercare or transition program, staff inconsistency in applying criteria for participation in various aspects of the treatment program, and resistance to treatment.

26. SCC staff believe that the fundamental reason that most committed SVPs are not engaged in aspects of treatment is because they all believe that it would disadvantage them from a legal perspective in their quest for release. This belief on the part of staff has played a role in the incomplete implementation of the treatment program design. Other reasons which have contributed to incomplete implementation of the treatment program by DSHS also include but are not limited to the small size of start-up program, limited resources, limited number of treatment staff qualified to teach certain psychosocial educational modules, staff inexperience in leading group therapy, staff inexperience in completing sexual deviancy evaluations, staff deference to initiation of treatment by committed residents, and competing administrative demands on professional staff.

27. There are currently more treatment opportunities and programs in place for convicted sex offenders in the DOC Twin Rivers prison facility than there are in the DSHS facility at SCC for civilly committed SVPs.

28. Opportunities for resident employment, structured leisure activities, and education are less at the SCC than at either the DOC Twin Rivers facility or the Atascadero

prison facility, whose prison treatment programs were the models for the design of the SCC treatment program, or at other DOC facilities. DSHS staff indicated that the small size of the SCC as a "start-up" program, budgetary constraints, and space limitations in the existing facility have been administrative constraints on establishing such programs and opportunities for residents who are civilly committed to the SCC for an intermediate term. Recently more employment opportunities have been provided.

29. SCC staff have verbally abused residents, making derisive comments about residents' status or race. On one occasion, a PSA mocked Native American religious practices in front of a Native American resident. Staff have laughed during strip searches of residents. Such derogatory and racist comments and behavior are inconsistent with the treatment purposes of SCC. In addition, residents have observed staff sleeping on duty and reporting to work flushed as though under the influence of controlled substances. Staff have requested a resident to harm other staff and have provided pornography to residents. Some residents are fearful of staff retaliation if they complain about this conduct. Such staff conduct is inconsistent with a treatment milieu.

30. The inadequacies in the treatment program and lack of work-release or aftercare program contribute to the belief in respondent and other inmates that the commitment to SCC constitutes a life sentence.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The burden of proof for purposes of this motion is on the Respondent to prove by a preponderance of the evidence that the actual conditions of his confinement and the actual nature and quality of treatment available to him at the SCC pursuant to RCW 71.09 violate his substantive due process rights.

2. Respondent has been unable to sustain his burden of proving that his detention in the SCC facility, which is both physically located within and physically designed for a Department of Corrections prison facility, violates his substantive due process rights.

3. Respondent has been unable to sustain his burden of proving that the stringent security procedures at SCC are excessive as to him and violate his substantive due process rights.

4. Respondent has been unable to sustain his burden of proving that the application of many DOC institutional rules, regulations and restrictions to the SCC facility (either pursuant to the DOC/SCC joint operating agreement or SCC administrative decisions) violates his substantive due process rights.

5. Respondent has proven that the following aspects of the SCC program violate his substantive due process rights:

a. The failure to clearly define and give notice of rules of conduct and behavior subject to infraction.

b. The lack of grievance procedures for inmate conduct violations.

c. The use of a "level. classification system which reflects neither security considerations nor treatment considerations and whose standards and criteria are only vaguely defined and thus permit arbitrary classification and treatment of residents.

d. Inadequacies in the treatment program consisting of the following:

1) Lack of sufficient staff trained, experienced and certified in treatment of sex offenders.

2) Lack of a comprehensive treatment program which includes timely deviancy

evaluations, highly structured treatment manuals, adequate scheduling of pre-group, core group, and psycho-educational modules, significant employment opportunities within the facility, involvement of family members in treatment, and a conditional release and aftercare program.

3) Lack of individual treatment plans which include objective bechmarks [sic] of improvement so as to document, measure and grade an individual's progress in therapy.

4) Lack of training and supervision of staff, resulting in verbal abuse of residents, lack of trust and rapport with residents and staff, and a milieu counterproductive to treatment.

6. The U.S. District Court has appointed a Special Master to correct deficiencies in staffing and the treatment program at SCC. *See, Turay v. Weston Cause No. C91-664WD (W.D. Wa.)*. A timetable for the Special Master's work has not yet been established.

7. Because respondent is a danger to the community, the State of Washington shall be given a short time in order to correct the deficiencies identified in the Conclusions of Law No. 5.

ORDER

1. Not later than November 23, 1994 the State shall file with the Court a plan to correct the deficiencies identified in Conclusion of Law No. 5. The State shall also provide the Court copies of all reports of the Special Master in *Turay v. Weston* unless release of such information has been restricted by the federal court. Respondent may file a response not later than December 2, 1994

2. Respondent's motion to dismiss is continued to December 9, 1994 at 3:00 p.m.

Done in open Court this 4th date of November, 1994.

/s/Sharon S. Armstrong
Honorable Sharon S. Armstrong

[Filed August 25, 1995]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDRE BRIGHAM YOUNG, Petitioner, v. DAVID WESTON, Superintendent of the Special Commitment Center, Respondent.	)	CASE NO. C94-480C ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on cross-motions for summary judgment. This case was previously referred to Magistrate Judge Philip K. Sweigert, who heard oral argument March 24, 1995. Neither party requests further oral argument. Having reviewed the relevant pleadings, memoranda, affidavits, and other documents on file, and having reviewed the transcript of the oral argument, the Court now finds and concludes as follows:

I. BACKGROUND

Andre Brigham Young is currently incarcerated at the Special Commitment Center in Monroe, Washington, serving an indefinite term of involuntary commitment pursuant to Washington's sexually violent predator statute, Wash. Rev. Code § 71.09. He petitions the Court for a writ of habeas corpus, arguing that his confinement is unconstitutional and that the statute is unconstitutional both facially and as applied.

The parties have filed cross-motions for summary judgment on purely legal issues. Petitioner Young requests an evidentiary hearing in the event the issues of law are not resolved in his favor. Because the Court agrees with Young that the statute is unconstitutional on its face, an evidentiary hearing is unnecessary. Nor is it necessary to address the State's argument that one of Young's twenty-two claims, the claim that the cumulative effect of evidentiary errors in the trial court violated his right to a fair trial, has not been exhausted.

II. THE SEXUALLY VIOLENT PREDATOR STATUTE

The Community Protection Act of 1990 comprises fourteen separate sections addressing various issues related to violent crimes, particularly violent sex offenses.[1] Provisions of the Act increase the sentences for sex offenders, require community registration of sex offenders, and provide for compensation for victims, among other things.

The Act also includes the Sexually Violent Predator statute, codified at Wash. Rev. Code § 71.09 (hereafter

[1] The Act was adopted by the Washington Legislature after several widely publicized acts of sexual violence provoked outrage among the public. In what is perhaps the most often cited incident, Earl Shriner, a man with a long history of violent sex offenses, assaulted and sexually mutilated a young boy. In response to this and other incidents, Governor Booth Gardner assembled the Task Force on Community Protection to evaluate and propose changes in the law. The task force found "gaps" in the existing system of determinate, but short, sentencing ranges and indefinite, but inapplicable, involuntary commitment laws. *See Task Force on Community Protection, Final Report to Booth Gardner, Governor, State of Washington*, II-5-6, II-21 (1989); *see also*, D. Boerner, *Confronting Violence: In the Act and In the Word*, 15 U. PUGET SOUND L. REV. 525 (1992). A detailed account of the role of the Task Force in propounding the legislation is unnecessary here. The history of the Sexually Violent Predator Statute and the prevailing climate in which it was adopted is analyzed in great detail in *Predators and Politics: A Symposium on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 507 (1992).

"Statute"). The Statute authorizes the indefinite commitment of defendants determined to be "sexually violent predators." In formulating the Statute, the Legislature was guided by the following findings:

> The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW, which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment of individuals with serious mental disorder and then return them to the community. In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment act, chapter 71.05 RCW, is inadequate to address the risk to reoffend because during confinement these offenders do not have access to potential victims and therefore they will not engage in an overt act during confinement as required by the involuntary treatment act for continued confinement. The legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment

> modalities for people appropriate for commitment under the involuntary treatment act.

Wash. Rev. Code § 71.09.010.

A "sexually violent predator" is a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." Wash. Rev. Code § 71.09.020(1). "Sexually violent offenses" include not only rape, rape of a child, and child molestation, but also such offenses as murder, assault, kidnapping, and burglary, when the offenses are determined to have been "sexually motivated." Wash. Rev. Code § 71.09.020(4).

The Statute does not attempt to define the term "personality disorder." However, "mental abnormality" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." Wash. Rev. Code § 71.09.020(2). "Predatory" acts, for purposes of the Statute, are "acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization." Wash. Rev. Code § 71.09.020(3).

The Statute allows the State to initiate the involuntary commitment process when a person's sentence for a sexually violent offense is about to expire, or when a person who was incompetent to stand trial on a charge of a sexually violent offense or who was found not guilty by reason of insanity of a sexually violent offense is about to be released. Wash. Rev. Code § 71.09.030. To initiate the commitment process, the county prosecutor or the attorney general files a petition alleging that the person is a "sexually violent offender." *Id.* A judge determines whether there is probable cause to believe that the person is a sexually violent predator. Wash.

Rev. Code § 71.09.030. If so, the judge directs that the person be taken into custody and transferred to a facility for evaluation "by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services." *Id.*

A person charged under the statute is entitled to a trial within 45 days after the filing of the petition. Wash. Rev. Code § 71.09.050. The detainee has the right to retained or appointed counsel and the right to retained or appointed experts. Both parties have a right to a jury trial. *Id.* The Statute further provides that

> The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. . . . If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services in a secure facility for control, care and treatment until such time as the person' [sic] mental abnormality or personality disorder has so changed that the person is safe to be at large.

Wash. Rev. Code 71.09.060(1). The Statute forbids detaining persons classified as sexually violent predators in state mental facilities or regional rehabilitation centers, "because these institutions are insufficiently secure for this population." Wash. Rev. Code § 71.09.060(3). Rather, the Statute allows confinement only in facilities located within correctional institutions. *Id.*; Wash. Rev. Code § 10.77.220.

The Statute sets forth no particular requirements for treatment of the detainee, except that care and treatment must conform to "constitutional requirements." Wash. Rev. Code. § 71.09.080. Once each year, the mental condition of a person committed under the Statute is evaluated. Wash. Rev.

Code § 71.09.070. A report of this examination is provided to the court. *Id.*

To obtain release, the detainee must petition the court. If it appears to the Secretary of the Department of Social and Health Services that "the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released," then the Secretary authorizes the detainee to file a petition. Wash. Rev. Code § 71.090.90. The court must hold a hearing within 45 days. *Id.* At the hearing, the State bears the burden of proving beyond a reasonable doubt that the petitioner's mental condition "remains such that the petitioner is not safe to be at large and that if discharged is likely to engage in predatory acts of sexual violence." *Id.*

The detainee may petition the court for release even if the Secretary has not authorized the petition. Wash. Rev. Code § 71.09.090(2). Once each year, the Secretary is required to provide the detainee written notice of his or her right to petition without the Secretary's approval. *Id.* Such notice must be accompanied by a waiver of rights. If the detainee does not waive the right to petition, the court must hold a show cause hearing "to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she is safe to be at large." *Id.* Although the detainee has a right to counsel at the hearing, the detainee has no right to be present. *Id.* If the court concludes that there is probable cause, it must hold a hearing similar to the original commitment hearing, affording the detainee the right to appointed or retained counsel and experts, and affording both parties the right to a jury trial. *Id.*

Other than these annual review procedures, the detainee has no right to a hearing on a petition for release "unless the petition contains facts upon which a court could find that the condition of the petitioner had so changed that a hearing was warranted." Wash. Rev. Code § 71.09.100.

Absent such a showing, the court is required to summarily deny the petition. *Id.*

III. PROCEDURAL HISTORY

Andre Brigham Young was convicted of rape on three occasions over a period spanning some twenty-two years. On October 24, 1990, one day prior to his scheduled release from prison on a 1985 conviction, the State filed a petition under the Statute. Young was transferred to the Special Commitment Center at the reformatory in Monroe, Washington, and held until his trial in February, 1991. The jury concluded that Young was a sexually violent predator, and he was committed. He filed a personal restraint petition, which was denied. On direct appeal from the trial court, a divided Washington Supreme Court held that the Statute is not unconstitutional. *In re Personal Restraint of Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993).

IV. ANALYSIS

Young asserts that the Statute is unconstitutional on a variety of grounds. Of these, the Court focuses on three: the violation of the substantive due process component of the Fourteenth Amendment; the violation of the Ex Post Facto Clause of Article 1, Section 10 of the Constitution; and the violation of the Double Jeopardy Clause of the Fifth Amendment.

A. Substantive Due Process

The Due Process Clause protects persons from the deprivation of life, liberty, or property without due process of law. U.S. CONST. Amend. V, XIV. The Due Process Clause protects individuals on both procedural and substantive levels. Substantive due process "prevents the government from engaging in conduct that 'shocks the conscience,' *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S. Ct. 149, 152 (1937)." *United States*

v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 2101 (1987). This substantive component of the Due Process Clause "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 1785 (1992) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983 (1990)). Infringement of a fundamental liberty interest must be narrowly tailored to serve a compelling state interest. *Reno v. Flores*, ___ U.S. ___ , 113 S. Ct. 1439, 1447 (1993).

At the heart of the liberty interests protected from arbitrary government actions is freedom from bodily restraint. *Youngberg v. Romeo*, 457 U.S. 307, 316, 102 S. Ct. 2452, 2458 (1982).

> As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution.

Foucha, 112 S. Ct. at 1791 (KENNEDY, J., dissenting).

For this reason, the Supreme Court has carefully circumscribed the instances in which the state may, for non-punitive reasons, detain or incarcerate an individual. For example, in times of war or insurrection, the government may detain individuals whom it believes are dangerous. *Moyer v. Peabody*, 212 U.S. 78, 84-85, 29 S. Ct. 235, 236-27 (1909). And, under certain circumstances, individuals may be detained pending arraignment, trial, or deportation, on the grounds that such individuals are dangerous to the community, dangerous to witnesses, or that they present flight risks. *See, e.g.*, *Flores*, 113 S. Ct. at 1447-1449 (approving regulatory detention of alien juveniles pending deportation); *Salerno*, 107 S. Ct. at 2103 (approving pretrial

detention of individuals found likely to be a danger to the community pursuant to the Bail Reform Act of 1984); *Schall v. Martin*, 467 U.S. 253, 104 S. Ct. 2403 (1984) (approving post-arrest detention of juveniles found to present a continuing danger to the community); *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854 (1975) (approving post-arrest detention of individual pending probable cause determination by a neutral magistrate); *Carlson v. Landon*, 342 U.S. 524, 537-42, 72 S. Ct. 525, 532-35 (1952) (finding no absolute barrier to detention of potentially dangerous resident aliens pending deportation).

The Supreme Court has also held that the state has authority to protect the community from the dangerous tendencies of some individuals who are mentally ill. *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 1809 (1979); *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 1854-1858 (1972). Absent clear and convincing evidence of both mental illness and dangerousness, however, detention is impermissible. *Foucha*, 112 S. Ct. at 1786; *see also*, *Jones v. United States*, 463 U.S. 354, 368, 103 S. Ct. 3043, 3052 (1983); *O'Connor v. Donaldson*, 422 U.S. 563, 95 S. Ct. 2486 (1975) (holding confinement of harmless mentally ill person is unconstitutional).

The State does not argue that the Sexually Violent Predator Statute is comparable to the pretrial detention schemes set forth in *Salerno*. *See Salerno*, 107 S. Ct. at 2102. Such an argument would, of course, fail: *Salerno* and its ancestors authorize pretrial detention of dangerous persons for stringently limited periods of time. *See id.*, at 2101; *Foucha*, 112 S. Ct. at 1787; *cf. Allen v. Illinois*, 478 U.S. 364, 370, 106 S. Ct. 2988, 2992 (1986) (noting, in the context of determining whether a proceeding is criminal or civil for purposes of the Self-Incrimination Clause, that detainee "may be released after the briefest time in confinement"). This is quite obviously not true of the Sexually Violent Predator Statute. Commitment pursuant to the Statute is indefinite.

Indeed, given the State's open acknowledgement of the poor treatment prospects for detainees, prolonged incarceration is to be expected.

The State argues, however, that the Statute passes constitutional muster as a traditional civil commitment scheme, such as that analyzed in *Addington*. This argument also fails. The essential component missing from the Sexually Violent Predator Statute is the requirement that the detainee be mentally ill. Like the scheme rejected in *Foucha*, the Statute here permits indefinite incarceration based on little more than a showing of potential future dangerousness. *See Foucha*, 112 S. Ct. at 1787.

The absence of a mental illness requirement is apparent both in the statutory language and in its legislative history. First, the legislature's findings expressly disavow the notion that the targeted group of persons are mentally ill. As explained in Wash. Rev. Code § 71.09.010, the target group is made up of individuals "who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act." Unlike persons with serious mental disorders, the legislature concluded, sexual predators "have antisocial personality features which are unamenable to existing mental illness treatment modalities," and for which the prognosis of cure is poor. *Id.*

The abandonment of a mental illness requirement is further revealed in the statutory definitions. As noted above, a "sexually violent predator," for purposes of the Statute, is a person who, among other things, "suffers from a mental abnormality or personality disorder." Wash. Rev. Code § 71.09.020(1). Amicus, the Washington State Psychiatric Association, explains that the term "mental abnormality" has neither a clinically significant meaning nor a recognized diagnostic use among treatment professionals.[2] Even

[2] The choice of "mental abnormality," as opposed to "mental illness" or "mental disorder" appears to be deliberate. Washington's involuntary treatment statute, Wash. Rev. Code. § 71.05 allows

accepting the statutory definition of "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others," Wash. Rev. Code. § 71.09.020(2), the term establishes an unacceptable tautology: a sexually violent predator "suffers from a mental condition that predisposes him or her to commit acts of sexual violence.

The concept of a "personality disorder" is similarly unenlightening. The term is undefined in the Statute. In the psychiatric lexicon, a personality disorder is characterized by maladaptive behavior. *See* Amicus Brief, Washington State Psychiatric Association, at 7; *DSM-IV* at 630. As Amicus notes, there are a wide range of personality disorders, none of which is peculiar to sex offenders. As with the concept of mental abnormality, the Statute's use of "personality disorder" evokes a circular definitional structure in which the only observed characteristic of the disorder is the predisposition to commit sex crimes.

Whatever doubt might remain after reviewing the Statute itself is resolved by the legislative history. The Governor's Task Force on Community Protection, whose proposed bill was substantially similar to that enacted, plainly intended to craft legislation to permit the involuntary commitment of persons who are not mentally ill:

> Civil commitment under the involuntary treatment law allows indefinite commitment, but is quite restrictive in its

commitment of persons with "medical disorders," a syndrome or pattern well-recognized among the psychiatric community. American Psychiatric Association, *Diagnostic and Statistical Manual*, at xxiv (Fourth ed. 1994). The legislature's decision to employ a term unrecognized in the psychiatric community, coupled with its provision of a definition of no value to treatment professionals is an indication that the State did not intend the Statute to capture only the seriously mentally ill.

> definitions. Under current laws, sexually violent predators only qualify for civil detention when a mental illness or mental disorder is present. The Task Force examined the histories of some individual violent predators who had been judged not to have a mental illness or mental disorder and therefore were not detainable.

Task Force on Community Protection, Final Report to Booth Gardner, Governor, State of Washington, II-21 (1989).[3]

Thus, this is not a [sic] enactment designed to provide for the commitment of dangerous mentally ill or mentally disordered persons. Rather, the Statute targets persons with "antisocial personality features." Wash. Rev. Code § 71.09.010. As in *Foucha*, persons within the Statute's reach have "an antisocial personality, a condition that is not a mental disease and that is untreatable." *Foucha*, 112 S. Ct. at 1782. But the mere presence of antisocial personality, or other personality disorder falling short of mental illness, is constitutionally insufficient to support indefinite confinement. As the Court explained in *Foucha*:

> [T]he State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there

[3] Indeed, in testimony before the legislature, one member of the Task Force explained that Washington's traditional civil commitment law, Wash. Rev. Code § 71.05, *et seq.*, was inappropriate for Earl Shriner, the perpetrator of the highly publicized assault and mutilation of a young boy, because he was not mentally ill. SENATE LAW & JUSTICE COMMITTEE, Testimony of Professor David Boerner at 1 (Jan. 10, 1990). In describing Earl Shriner, Professor Boerner stated "Mr. Shriner is not mentally ill as that term is defined. He is clearly a problem, and clearly very dangerous, but he doesn't suffer from a classical mental illness."

> is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not ill who could be shown to have a personality that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.

Foucha, 112 S. Ct. at 1787.

The Court concludes that the Sexually Violent Predator Statute, allowing as it does the indefinite confinement of persons who are not mentally ill, violates the substantive protections of the Due Process Clause. Predictions of dangerousness alone are an insufficient basis to continue indefinitely the incarceration of offenders who have completed their prison terms.

B. Ex Post Facto

Article I of the United States Constitution provides that the states may not pass any ex post facto law. In interpreting the scope of the ex post facto prohibition, courts have long been guided by the words of Justice Chase in *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798). *See, e.g.*, *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 2721 (1990); *Miller v. Florida*, 482 U.S. 423, 107 S. Ct. 2446, 2450 (1987). Justice Chase explained his understanding of what fell within the scope of the prohibition:

> [1] Every law that makes an action done before the passing of the law, and which

> was innocent when done, criminal; and punishes such action. [2] Every law that aggravates a crime, or makes it greater than it was, when committed. [3] Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. [4] Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Calder, 3 Dall. At 390 (emphasis omitted). The ex post facto prohibition ensures that legislative acts "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 964 (1981). In addition, the ban "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Id.*

Two critical elements must be present for a criminal or penal law to be ex post facto: (1) "it must be retrospective, that is, it must apply to events occurring before its enactment," and (2) "it must disadvantage the offender affected by it." *Weaver*, 101 S. Ct. at 964. The debate here is not whether the Sexually Violent Predator Statute is retrospective or disadvantageous in its application to Young. Rather, the debate concerns whether the Statute is penal or criminal in nature.

The parties cite no Supreme Court decision directly addressing the issue here: whether, for purposes of the ex post facto clause, a law is criminal or penal, as opposed to civil. The Court notes, at the outset, that by labeling the Statute "civil," the State "does not thereby immunize it from scrutiny" under the clause. *See Collins*, 110 S. Ct. at 2721. "Subtle ex post facto violations are no more permissible than overt ones. . . . [T]he constitutional prohibition is addressed to laws, 'whatever their form,' which make innocent acts

criminal, alter the nature of the offense, or increase the punishment." *Id.* (quoting *Beazell v. Ohio*, 269 U.S. 167, 170, 46 S. Ct. 68, 68-69 (1925)).

Where the legislature has indicated an intention to establish a civil scheme, the Court must consider whether that scheme is "so punitive either in purpose or effect as to negate that intention." *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 2641 (1980). Only the clearest proof will suffice to establish the unconstitutionality of a statute on this ground. *Id.*

The Supreme Court has formulated a non-exclusive list of factors to consider in determining whether a statute is penal or regulatory in the context of the procedural safeguards of the Fifth and Sixth Amendments:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554, 567 (holding unconstitutionally punitive certain statutes that deprived individuals of citizenship without Fifth and Sixth Amendment protections); *see also Allen*, 106 S. Ct. 2988 (1986) (analyzing the issue of whether a commitment statute is civil or criminal for purposes of the Self-Incrimination Clause of the Fifth Amendment). These factors are equally relevant in considering whether the Sexually Violent Predator

Statute is civil or criminal for purposes of the Ex Post Facto Clause. *See Artway v. Attorney General*, 876 F. Supp. 666, 689 (D.N.J. 1995).

The Court concludes that the Statute cannot be classified as civil, considering the relevant factors. First, there is no dispute that Statute subjects individuals to an affirmative restraint. The Statute entails a complete loss of freedom for an indefinite period of time. The potential length of this confinement, and the periodic opportunities for release, are also relevant considerations. In *Allen*, the Supreme Court held that Illinois' Sexually Dangerous Persons Act was civil, partly because, in addition to providing treatment, the Act "established a system under which committed persons may be released after the briefest time in confinement," and were free to "apply for release at any time." *Allen*, 106 S. Ct. at 2992. The Illinois act provides for case reviews every six months. Here, however, a detainee's case is reviewed only once per year. And although the statute purports to allow a detainee to petition for release at any time, in fact a petition is subject to a full adversarial hearing only if (1) the Secretary of the Department of Social and Health Services authorizes the petition or (2) the detainee establishes probable cause that he is no longer dangerous. Further, unlike the Illinois act, Washington's Statute does not provide for conditional release of offenders who cannot be determined with certainty to be dangerous. The lack of conditional release provisions can be expected to result in longer terms of confinement.

Second, the Statute applies to behavior that is already criminal. Indeed, it is expressly limited in its application to persons who have been convicted of a crime or who have been charged with a crime but found incompetent to stand trial or found not guilty by reason of insanity. *Cf. Artway*, 876 F. Supp. At 691.

Third, the Statute, in its operation, will promote the traditional aims of punishment – retribution and deterrence.

In *Allen* the Supreme Court determined that because Illinois had "disavowed any interest in punishment" and was focused solely on providing treatment to mentally disordered sex offenders, its commitment statute was civil, rather than criminal. *Allen*, 106 S. Ct. at 2992. Central to the Illinois statutory scheme is the requirement that the State elect either punishment or treatment at the time the offender is charged. *See Allen*, 106 S. Ct. at 2994 ("the State serves its purpose of *treating* rather than punishing sexually dangerous persons"); *People v. Patch*, 9 Ill. App. 3d 134, 293 N.E.2d 661, 665 (1972); *People v. Allen*, 107 Ill. 2d 91, 481 N.E.2d 690, 695 (1985). In sharp contrast, Washington's Sexually Violent Predator Statute requires that the convicted sex offender serve his sentence prior to commitment; the State has no power to initiate proceedings under the Statute until the sentence of the convicted offender "is about to expire, or has expired." Wash. Rev. Code § 71.09.030. The operation of the Statute is not materially different for persons who are charged with a sex offense but found incompetent to stand trial or found not guilty by reason of insanity. In both instances, the State may initiate proceedings under the Statute only when the person is about to be released or has been released. *Id.*

Thus, despite the State's claims that the Statute is intended only to provide treatment, the State evinces a keen interest in punishment. It is immaterial, for purposes of this analysis, that the punishment aims are primarily expressed in other Washington laws, rather than being incorporated directly into the Statute. The Statute is inextricably linked to the traditional goals of punishment, because it requires, on its face, that the detainee serve his entire criminal sentence before being committed or treated.

The punishment imperative also undermines the State's purported interest in treating violent sexual predators. The Statute forecloses the possibility that offenders will be evaluated and treated until after they have been punished. Of

course, it defies reason to suggest that the mental abnormalities or personality disorders causing violent sexual predation surface only at the termination of a prison term. Common sense suggests that such mental conditions, if they are indeed the cause of sexual violence, are present at the time the offense is committed. Setting aside the question of whether a prison term exacerbates or minimizes the mental condition of a sex offender, it plainly delays the treatment that must constitutionally accompany commitment pursuant to the Statute. The failure of the Statute to provide for examination or treatment prior to the completion of the punishment phase strongly suggests that treatment is of secondary, rather than primary, concern.

The Court concludes that, although there is clearly an alternative purpose to which the Statute may be connected and although indefinite commitment is not necessarily excessive in relation to that purpose, these factors are greatly outweighed by factors favoring the conclusion that the Statute is criminal. As noted above, there is no dispute that, as to Young, the Statute is retrospective and disadvantageous. Accordingly, it stands in violation of the ex post facto prohibition of the Constitution.

C. Double Jeopardy

"[T]he Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440, 109 S. Ct. 1892, 1897 (1989). The third of these abuses, multiple punishments, is at issue in this case.

The Double Jeopardy Clause does not apply only to punishment imposed in criminal proceedings; rather, its violation "can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." *Halper*, 109 S. Ct. at 1901.

> In making this assessment, the labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. . . . [T]he determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment. . . . From these premises, it follows that a *civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.*

Id. at 1901-02 (emphasis added and citations omitted).

As explained above, in the Court's analysis of the Ex Post Facto Clause, the Statute at issue here serves the traditional aims of punishment – retribution and deterrence. *Cf. Halper*, 109 S. Ct. at 1902. The analysis applies equally for purposes of the Double Jeopardy Clause. Having once been punished for the commission of a violent sexual offense, the offender is subject to further incarceration under the Statute's commitment scheme. The punishment imperative embodied in the statutory approach, in addition to the secondary nature of the treatment provisions, renders the Statute an unconstitutional second punishment.

V. CONCLUSION

The Court concludes that Washington's Sexually Violent Predator Statute, Wash. Rev. Code § 71.09, violates the substantive due process component of the Fourteenth Amendment, the Ex Post Facto Clause, and the Double

Jeopardy Clause. The other issues raised in the petition for a writ of habeas corpus need not be addressed.

The writ is GRANTED.

In anticipation of appeal, the Court directs the parties to brief the issue of release pending appeal. Each party shall file a brief on this issue no later than September 5, 1995. The parties may file responsive briefs no later than September 7, 1995. The parties shall indicate whether oral argument is requested.

SO ORDERED this 25 day of August, 1995.

/s/John C. Coughenour
John C. Coughenour
United States District Judge

[Filed October 1, 1997]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD G. TURAY,	)	NO. C91-664WD
	)	
Plaintiff,	)	ORDER ON PLAINTIFF'S
v.	)	RENEWED MOTION FOR
	)	CONTEMPT AND
MARK SELING, et al.,	)	DEFENDANTS'
	)	RENEWED MOTION FOR
	)	RELEASE FROM
Defendants.	)	INJUNCTION

Plaintiff is a resident of the Special Commitment Center ("SCC") at Monroe, Washington, having been civilly committed pursuant to a Washington statute, RCW ch. 71.09, as a violent sexual predator. He sued in this court alleging several violations related to his conditions of confinement. At a trial in 1994, the jury found for defendants on all claims but one, i.e., that defendants had failed to provide plaintiff with constitutionally adequate mental health treatment. On June 3, 1994, an injunction was issued which required the defendants to bring the SCC treatment program into compliance with constitutional standards. Dkt. # 220. On September 22, 1994, Dr. Janice K. Marques was appointed as special master to assist is [sic] this process. Dkt. # 261. Dr. Marques has been working with the defendants and SCC residents since that time. She has submitted twelve reports to the court in regard to progress toward compliance and areas in which further work is needed.

On March 6, 1996, a hearing was held on plaintiff's motion for contempt and defendants' motion for release from the injunction. Evidence was received and argument by counsel and *amici curiae* was heard. An order was entered

denying the contempt motion and keeping the injunction in force. Dkt. # 468. Later in 1996, by agreement of counsel, eight other SCC residents were allowed to intervene as plaintiffs for the limited purpose of participating in the administration and enforcement of the injunction. Dkt. # 520.

On January 13, 1997, a hearing was held on plaintiff's renewed motion for contempt, in which the plaintiff-intervenors joined, and defendants' motion for release from the injunction. The court heard testimony by the special master and the ombudsman working with SCC, and argument of counsel and *amici curiae*. At plaintiffs' request, the district judge visited SCC on January 14, 1997, to view the facility. An order dated February 4, 1997, was entered finding that while defendants had made substantial progress toward compliance with the injunction, full compliance had not yet been achieved. The motion for contempt was denied and the injunction was continued in effect. Dkt. # 645.

Plaintiff, joined by plaintiff-intervenors, now renews his motion for contempt, and defendants renew their motion for release from the injunction. Both sides have submitted thorough briefs and declarations. A hearing was held on September 22, 1997, in which the court heard testimony from the special master; from plaintiff-intervenors Herman Paschke, Joel Reimer, and Ronald Petersen; and from defendants Mark Seling and Robert Smith, who are, respectively, the superintendent and clinical director of the SCC.

The February 4, 1997, order stated that the court would expect compliance with the injunction to be complete by the time of the next hearing. The first question is whether that has been achieved. The test is whether defendants now provide plaintiff and the intervenors with access to mental health treatment that gives them a realistic opportunity to be cured or to improve the mental condition for which they were

confined. *See Youngberg v. Romeo*, 457 U.S. 307, 319-22 (1982); *Ohlinger v. Watson*, 652 F.2d 778 (9th Cir. 1980).

The evidence shows that progress has continued to be made at SCC, but that compliance is not yet complete. Under the leadership of Dr. Seling and Dr. Smith, and with the help of the special master, a clear policy for staff training has been adopted, and resources are available to implement it. Comprehensive treatment plans are being developed to guide the individualized treatment of residents. A treatment database is in place to track the delivery of services. A policy has been adopted for community re-entry. Substantial efforts are being made to improve trust and rapport between the residents and the staff. In that regard, the superintendent's testimony at the September 22 hearing recognized that the injunction had been necessary, and the residents' testimony suggested a growing willingness among the population to accept treatment and end hostilities with the SCC. It appears that the clinical director will be able to spend more time on the living unit than has heretofore been done. A grievance policy has been implemented, and a resident advocate, ombudsman, and dispute resolution resource are in place. An advisory board has been formed to conduct ongoing oversight of the program at SCC, and an independent inspection of care review by mental health professionals has been initiated.

Notwithstanding the foregoing improvements, the defendants have not yet achieved full compliance with the injunction. The central need is to translate into reality a program that exists on paper. Only recently has the Supreme Court removed the long-standing doubt over the constitutionality of statutes such as the one establishing the SCC. *See Kansas v. Hendricks*, 521 U.S. ---, 138 L. Ed. 2d 501 (1997). The program itself, as both Dr. Marques and Dr. Seling testified, is new. What is required is not just a plan but a reality – the genuine providing of adequate mental health treatment to all SCC residents willing to accept it. The

special master testified as to some of the specific elements that illustrate a fully operational program: that the staff members understand the treatment model and their roles within it; that the delivery of services be effective and consistent across treatment teams; that residents know what they must do to move toward release and where they are in the treatment process; that there be ongoing monitoring of the treatment process; that measures of progress be correlated to the goals of treatment; that the residents know the program policies; that policy enforcement be consistent; that the residents be treated with respect; and that the program be able to deal with the long-term needs of those not engaged in treatment.

The overcrowded physical plant at SCC remains a serious obstacle to providing constitutionally adequate mental health treatment. This problem will only be exacerbated as the SCC population grows. A change of location is under consideration by the Washington State Department of Social and Health Services and the Department of Corrections, but no decision has been made. McNeil Island, Washington, has been proposed as a new site, and clearly would be superior to any attempt to expand the existing facility. To enhance the prospects for achieving compliance with the injunction, SCC should be moved to a better facility as soon as possible.

Accordingly, the injunction will remain in force and the special master will continue to serve pending further order of the court. Defendants' motion to dissolve the injunction is denied.

Plaintiff's motion for contempt is also denied. For civil contempt to occur, it must be shown that a party has failed to take all reasonable steps within it power to comply with a court order. *In re Dual-Deck Video Cassette Antitrust Litigation*, 10 F.3d 693, 695 (9th Cir. 1993). In this complex situation, the evidence does not show that the defendants

have failed to take reasonable steps to comply with the injunction.

The injunction should remain in force no longer than necessary to attain full compliance. This may take a year, as plaintiff and the plaintiff-intervenors suggest, or it may take less time. Accordingly, the following schedule is now adopted: A report by the special master, using the process heretofore in effect, will be due on April 20, 1998; a further report, if necessary, will be due on September 28, 1998. If the injunction is not dissolved earlier, a hearing as to compliance will be held at 9:00 a.m. on October 5, 1998. Any party may move for contempt or for dissolution of the injunction before the scheduled hearing.

The clerk is directed to send copies of this order to all counsel of record, to the special master, and to *amici curiae*.

Dated: October 1, 1997.

/s/William L. Dwyer
William L. Dwyer
United States District Judge

[Filed November 25, 1998]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD G. TURAY, Plaintiff, v. DR. MARK SELING, Ph.D., et al., Defendants.	NO. C91-664WD
JERRY R. SHARP, et al., Plaintiffs, v. DAVID B. WESTON, et al., Defendants.	NO. C94-121WD
RANDY PEDERSEN, et al., Plaintiffs, v. TIM HILL, et al., Defendants.	NO. C94-211WD

JOHN F. HALL, et al., Plaintiffs, v. LYLE QUASIM, et al., Defendants.	NO. C95-1111WD
RONALD PETERSEN, et al., Plaintiffs, v. WILLIAM DEHMER, et al., Defendants.	NO. C96-415WD FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER RE INJUNCTIVE RELIEF

I. INTRODUCTION

These cases involve the conditions of confinement of persons civilly committed as sexually violent predators at the Special Commitment Center ("SCC") at McNeil Island, Washington, pursuant to a Washington statute, RCW ch. 71.09. The SCC formerly was located at Monroe, Washington. Richard Turay, an SCC resident, brought the first case, No. C91-664WD, claiming that certain conditions of his confinement violated his civil rights and seeking damages and injunctive relief pursuant to 42 U.S.C. § 1983. At a trial in 1994, the jury found for the defendants on all of plaintiff Turay's claims but one, i.e., that defendants had failed to provide him constitutionally adequate mental health treatment. This court then issued an injunction requiring defendants to bring the SCC treatment program into compliance with constitutional standards. When progress was slow, a special master - Dr. Janice K. Marques, who had been nominated by defendants - was appointed to assist defendants in achieving compliance and to submit reports to

the court. Dr. Marques has delivered a series of reports, the most recent being her fourteenth, filed on September 29, 1998 (Dkt. # 965). In 1996, eight other male SCC residents were permitted without objection to intervene as plaintiffs in C91-664WD for the limited purpose of participating in the administration and enforcement of the injunction. In 1996, and again in 1997, plaintiffs moved for contempt and defendants moved to dissolve the injunction; following hearings, the motions were denied. Similar motions were the subject of an evidentiary hearing held on October 6-9, 1998. In advance of the injunction compliance hearing, the court issued an order requesting briefs and evidence on the following:

> 1. What has been accomplished at the Special Commitment Center ("SCC") in each area covered by the injunction, and what, if anything, remains to be done to attain the objective of providing constitutionally adequate mental health treatment.
>
> 2. The therapy now being provided or offered.
>
> 3. Any release plan, with defined progress goals, that has been adopted.
>
> 4. The number of residents currently in therapy, and the number not in therapy.
>
> 5. The nature of the housing and treatment being provided to plaintiff-intervenor Laura McCollum.
>
> 6. The extent to which the SCC's being located on the grounds of a prison impedes compliance with the injunction (bearing in mind that the state statute, RCW 71.090.060(3), provides that the "facility shall not be located on the grounds of any state

> mental facility or regional habitation center . . .").
>
> 7. The best available SCC resident population projections for men and women for the next five years and the next ten years.
>
> 8. Whether a larger facility for the SCC will be needed and, if so:
>
> (a) Whether it should be located on the grounds of a prison;
>
> (b) Whether, with or without a legislative change, another setting would be better, and what that setting should be; and
>
> (c) What alternatives exist for the providing of a larger facility with improved chances of successful treatment.
>
> 9. A comparison of the Special Commitment Center program with comparable programs in other states (e.g., California, Kansas, and Minnesota) insofar as relevant to whether injunction compliance has been achieved and, if not, what remaining steps can and should be taken.

Dkt. # 933, July 30, 1998.

The *Sharp* cases (No. C94-121WD and later cases consolidated with it) were commenced by other SCC residents seeking damages and injunctive relief relating to their conditions of confinement. The damages claims of the plaintiffs (Rolando Aguilar, Joseph Aqui, Curtis Beard, Paul Begay, Elmer Campbell, Samuel Donaghe, Anthony Gallegos, John Hall, Herman Paschke, Randy Pedersen, Ronald Petersen, Joel Reimer, Jerry Sharp, Gilberto Soliz, and Richard Turay) were settled in mediation in 1998,

defendants agreeing to pay $150,000 ($10,000 per claimant) plus $250,000 in attorneys' fees. In regard to injunctive relief, the settlement agreement provided:

> Plaintiffs' injunction claims in the *Sharp* consolidated cases, as specified hereafter, are preserved for adjudication beginning on October 6th, 1998 before Judge Dwyer. These include the subject matters addressed in the draft Permanent Injunction of July 27, 1998, that has been sent by the plaintiffs to defendants. More specifically, the parties will ask the court to adjudicate issues raised in the Special Master's 13th Report; the issues identified in the court's Minute Order of July 30, 1998, in the *Turay* case; adequacy of classification and grievance systems, family and extended visitation, enrichment of residential living (including vocational, educational, religious, and hobby opportunities), Department of Corrections [DOC] involvement and program oversight (as outlined in plaintiffs' proposed draft Permanent Injunction). The injunction hearing may also include legal access issues raised by pro se plaintiff Reimer. Defendants, by this settlement agreement, do not waive any objection, or defense of law, or equity as to the merits of any injunctive issues, either jointly and/or severally, under consideration in the adjudication beginning on October 6, 1998, or in pending motions for summary judgment, as to these claims, if unresolved by negotiations.

Dkt. # 537, filed September 1, 1998, at page three.

The partial settlement agreement in the *Sharp* cases also provided:

> On June 25, 1995, the federal district court entered an Order Granting Partial Summary Judgment in this case. The Order for Partial Summary Judgment was based on (1) an Order and Injunction filed by federal district court, order in *Turay v. Weston, et al.*, C91-664WD (June 6, 1994), and (2) selected portions of the following orders: (a) Findings of Fact, Conclusions of Law and Order on Respondent's Motion to Dismiss on Unconstitutional Conditions of Confinement at SCC in *In re Detention of Campbell*, King Co. No. 93-2-15348-1 (November 7, 1994), and (b) Findings of Fact, Conclusions of Law and Order on Respondent's Motion to dismiss on Unconstitutional Conditions of Confinement at SCC in *In re the Detention of Pedersen*, King Co. No. 93-2-09933-9 (November 14, 1994). The parties agree that all prior orders in the *Sharp* consolidated cases constitute the law of the case for purposes of the October 6, 1998, injunction hearing and may be referred to by any party.

Id.

Accordingly, by agreement of the parties and pursuant to Fed. R. Civ. P. 42(a), the claims for injunctive relief in *Sharp* (as defined in the settlement agreement), and the injunction compliance issues in *Turay*, were tried together in an evidentiary hearing held on October 6-9, 1998. The first witness called was the special master, who testified on direct examination as a court witness and then was cross-examined by both sides. The parties then presented their evidence and rested their cases. Thereafter, at the court's request, the parties filed post-trial briefs and proposed findings of fact and conclusions of law. The evidence received, and the arguments, briefs (including pro se plaintiff

Ronald Petersen's late-filed reply brief), and proposed findings and conclusions have been fully considered.

Because the injunction issues were tried together, this order, with findings and conclusions, will be filed in both cases. It should be noted, however, that C91-664WD and C94-121WD have not been consolidated for any other purpose, and remain as separate cases with separate clerk's files.

II. THE CONSTITUTIONAL REQUIREMENT OF MENTAL HEALTH TREATMENT

RCW ch. 71.09 is a civil commitment statute. A sex offender, typically one who has served his prison term or is about to complete his sentence, may be detained and committed under it for an indefinite time. The term "sexually violent predator" is defined as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(1). If a committed person petitions for discharge from confinement, the central question is whether his mental abnormality or personality disorder has so changed that he is no longer likely to engage in predatory acts of sexual violence. RCW 71.09.090. The Fourteenth Amendment Due Process Clause of the United States Constitution requires state officials to provide civilly-committed persons, such as these plaintiffs, with access to mental health treatment that gives them a realistic opportunity to be cured or to improve the mental condition for which they were confined. *See Youngberg v. Romeo*, 457 U.S. 307, 319-22 (1982); *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir. 1980). These plaintiffs, and others involuntarily committed, cannot simply be warehoused and put out of sight; they must be afforded adequate treatment. Moreover, defendants have a duty to provide plaintiffs with "more considerate treatment and conditions of confinement than

criminals whose conditions of confinement are designed to punish." *Youngberg*, 457 U.S. at 322. Recognizing these requirements, the Washington statute provides that "[a]ny person committed pursuant to this chapter has the right to adequate care and individualized treatment." RCW 71.09.080(2). The state, however, "enjoy[s] wide latitude in developing treatment regimens [for sex offenders]," *Kansas v. Hendricks*, 521 U.S. 346, ___, 117 S. Ct. 2072, 2085 n.4 (1997), and "liability [on a claim for constitutional deprivation] may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg*, 457 U.S. at 323 (1982).

Defendants argue that the deference to be afforded to decisions based upon accepted professional judgment, practice, or standards means that there should be virtually no judicial review, stating: "No one questions that Drs. Smith and Seling [the SCC's superintendent and clinical director] are qualified professionals exercising their discretion. The inquiry should end there." Defendants' Closing Argument, Dkt. # 1010, at 7. That is not the law, and such a view would eviscerate any protection of constitutional rights. The *Youngberg* standard is intended "to prevent a judge or jury from using unguided discretion to balance the individual's liberty interest against the state interest in restraining liberty." *Thomas S. v. Flaherty*, 902 F.2d 250, 252 (4th Cir. 1990) (citation and internal quotation marks omitted). It is not meant to transfer the safeguarding of constitutional rights from the courts to mental health professionals. If a mere expression of opinion by a state-employed superintendent or psychologist were deemed conclusive, the constitutional standard would vanish; conditions of confinement would be upheld without scrutiny, and the outcome would depend on who happened to be in charge of a particular program, with

no consistency from state to state or even from one institution to another within a state.

The *Youngberg* rule is that "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." 457 U.S. at 323. That rule is observed in this order. The respects in which the *Sharp* plaintiffs are entitled to injunctive relief are identical to those in which full compliance with the *Turay* injunction remains to be achieved. Most of these shortcomings involve acts or conditions that are not based upon professional judgment at all.

III. SUMMARY OF PRIOR PROCEEDINGS

The evidence in the 1994 trial of plaintiff Turay's case clearly proved a failure to make constitutionally adequate treatment available, and the jury's verdict reflected that (Dkt. # 202). On June 3, 1994 the court, issued an injunction which required the defendants to bring the SCC treatment program into compliance with constitutional standards (Dkt. # 220). The court also directed defendants to file a report by July 20, 1994, describing the steps taken to satisfy the terms of the injunction.

On August 22, 1994, the court found that defendants had failed to present a sufficient plan for compliance, and entered a supplemental order clarifying the terms of the injunction and directing the parties to submit the names and qualifications of two nominees for the position of special master (Dkt. # 240). On September 22, 1994, the court appointed Dr. Janice K. Marques (Dkt. # 261). The order defined the special master's duties as follows: "to provide information and expert advice to defendants to assist them in complying promptly with the injunction herein (Dkt. # 220), and to make periodic reports to the court in regard to defendants' compliance or non-compliance with the

injunction." Dr. Marques has been working with the defendants and SCC residents since that time. She has submitted fourteen reports to the court, which are on file in C91-664WD.

In October 1995, plaintiff Turay filed a motion for further injunctive relief and for contempt. The court granted an unopposed part of the motion that sought appointment of a full-time ombudsman. The request for a contempt finding was denied, but the order noted that "in some respects this part of the motion raises serious issues; for example, defendants still have not complied adequately with the June 3, 1994 order that they 'provide a psychologist or psychiatrist expert in the diagnosis and treatment of sex offenders to supervise the clinical work of treatment staff.'" The order also stated that "[w]ith the help of the special master, the defendants have an opportunity to achieve full compliance with the court's prior orders between now and the time of the March 6 [1996] hearing." (Dkt. # 408).

On March 6, 1996, a hearing was held on plaintiff Turay's renewed motion for contempt and on defendants' motion for release from the injunction. Evidence was received and argument was heard. An order was entered denying the contempt motion and keeping the injunction in force (Dkt. # 468). The order stated that "more remains to be done to achieve full compliance" and that "defendants must work diligently with the special master to achieve full compliance with the injunction."

Later in 1996, by agreement of the parties, eight other SCC residents were allowed to intervene as plaintiffs for the limited purpose of participating in the administration and enforcement of the injunction (Dkt. # 520).

On January 13, 1997, another evidentiary hearing was held of the issue of compliance with the injunction. The district judge visited the SCC at Monroe on January 14, 1997. On February 6, 1997, an order was issued denying plaintiffs' motion for contempt but finding that more

remained to be done to meet constitutional standards (Dkt. # 645). The order noted, among other things, that staff members need experience working "under the direct supervision of an expert in the field;" that "a community transition component . . . is not yet operational;" that "treatment with a resident's family members has not yet been adequately integrated into the program, although progress has been made;" that "each treatment plan, as the special master has testified, should broadly assess a resident's needs and skills beyond the offense behavior;" that "each resident should be able to compare his program to objective measures of progress;" and that "before the injunction is dissolved a structure for objective, external oversight must be in place." The order also stated that: "The court will expect compliance to be complete at the end of this six-month period now provided."

On September 22, 1997, another evidentiary hearing was held on the issue of compliance. On October 1, 1997, the court entered an Order on Plaintiff's Renewed Motion for Contempt and Defendants' Renewed Motion for Release from Injunction, stating in part:

> Notwithstanding the foregoing improvements, the defendants have not yet achieved full compliance with the injunction. The central need is to translate into reality a program that exists on paper. Only recently has the Supreme Court removed the long-standing doubt over the constitutionality of statutes such as the one establishing the SCC. *See Kansas v. Hendricks*, 521 U.S. ---, 138 L. Ed. 2d 501 (1997). The program itself, as both Dr. Marques and Dr. Seling testified, is new. What is required is not just a plan but a reality - the genuine providing of adequate mental health treatment to all SCC residents willing to accept it. The special master

> testified as to some of the specific elements that illustrate a fully operational program: that the staff members understand the treatment model and their roles within it; that the delivery of services be effective and consistent across treatment teams; that residents know what they must do to move toward release and where they are in the treatment process; that there be ongoing monitoring of the treatment process; that measures of progress be correlated to the goals of treatment; that the residents know the program policies; that policy enforcement be consistent; that the residents be treated with respect; and that the program be able to deal with the long-term needs of those not engaged in treatment.

Dkt. # 832 at 4-5.

The October 1, 1997 order also stated that "[t]he overcrowded physical plant at SCC remains a serious obstacle to providing constitutionally adequate mental health treatment." *Id.* at 5. The motions for contempt and for release from the injunction were denied. The order stated that the "injunction should remain in force no longer than necessary to attain full compliance. This may take a year, as plaintiff and the plaintiff-intervenors suggest, or it may take less time." *Id.* at 5. A schedule was set for further reports by the special master and for an October 1998 hearing, with a proviso that "[a]ny party may move for contempt or for dissolution of the injunction before the scheduled hearing." *Id.* at 5.

On March 30, 1998, an Order on Plaintiff's Motion re Authority of Ombudsman was entered (Dkt. # 878), finding that the defendants had attempted to curtail the ombudsman's authority to conduct investigations without first obtaining an order modifying the previously stipulated and ordered definition of the ombudsman's responsibilities. Defendants

were directed "to refrain from any further attempts to alter court-ordered requirements without obtaining court approval."

In her thirteenth report, dated May 14, 1998, the special master made ten "specific recommendations regarding how the program can complete [its] work before the hearing that is scheduled for October 5, 1998." (Dkt. # 901).

On July 14, 1998, the district judge made a second site visit, this time to the relocated SCC facility at McNeil Island.

In her fourteenth report, filed on September 29, 1998 (Dkt. # 965), the special master listed, in each area of the injunction, specific steps still necessary, in her opinion, to achieve compliance with professional standards.

The foregoing summarizes the *Turay* proceedings leading to the October 6-9, 1998, hearing in regard to injunction compliance.

The *Sharp* cases have a simpler history. As noted above, the damages claims were settled and the claims for injunctive relief were preserved and were tried to the court on October 6-9, 1998.

IV. FINDINGS OF FACT

The facts set out below are found by a preponderance of the evidence or by stipulation. Any finding of fact that should be denominated a conclusion of law is adopted as such.

1. Since the September 1997 hearing, notwithstanding the disruption and staff turnover caused by a move of the SCC from Monroe to McNeil Island in April 1998, the defendants have made progress toward establishing a mental health treatment program that will meet constitutional requirements. Dr. Mark Seling, the SCC superintendent, and Dr. Robert Smith, the clinical director,

who have replaced earlier appointees in their official positions and as defendants herein, are qualified professionals.

2. Nevertheless, as shown by the evidence without substantial contradiction, there remain shortcomings that are serious enough to require a finding that constitutional minimum requirements are not yet met. The necessity of keeping the injunction in force has been confirmed by every independent expert who testified or whose opinion otherwise appears in the record, including defendants' expert Dr. Robert Prentky. The evidence provided by two ombudsmen and two resident advocates, who were or are state employees, also confirms that it would be premature to dissolve the injunction now. The injunction should remain in force as long as necessary to assure that the violation of constitutional rights has been cured, but no longer.

3. The respects in which the defendants have not yet made constitutionally adequate mental health treatment available to the plaintiffs, and the corresponding areas in which injunctive relief is warranted, are set forth below. The special master in her fourteenth report has given detailed recommendations in each area. Those recommendations should assist defendants in achieving compliance. Recognizing, however, that the court should not try to micro-manage the institution, and that defendants' professional judgment must be respected, the court will not order every recommended detail, but will make findings and order relief in broader terms as required by the evidence.

4. The applicable professional standards for the treatment of sexually violent offenders have been summarized by the Association for the Treatment of Sexual Abusers ("ATSA"). These are the standards that afford persons committed a realistic opportunity to be cured or to improve the mental condition for which they were confined, and thus meet the constitutional requirement. As set out in Exhibit 78, these standards include the following:

The program should be housed in a treatment-oriented facility that is similar to other settings for persons who are civilly committed in the state. Because these laws have arisen out of a genuine concern of the public for the safety of future victims and the community, programs should be developed and located where they can provide the greatest degree of security while the offender is being treated. Staff in the commitment facility should be qualified and appropriately licensed. Oversight should be provided by both an internal review process and an external body either through a licensing organization or another entity.

The treatment program should be consistent with current institutional standards for the treatment of sexual offenders and include all the components recognized as necessary for maximum treatment potential. Individualized treatment plans are critical and should provide for systematic measurements of the individual's progress. The program should be structured with identifiable phases so individuals can mark their progress in treatment.

Those who successfully complete the inpatient phase of treatment and whose risk is considered manageable in the community should be moved into a conditional release program that includes monitoring and supervision, as well as continued community-based treatment.

5. The findings of fact adopted by the Hon. Barbara J. Rothstein in *Sharp*, which are set out in an appendix to plaintiffs' pre-hearing brief (Dkt. # 989, App. A), have been stipulated to apply in the *Sharp* consolidated cases.

They are therefore adopted as findings herein as to the *Sharp* cases only. The outcome as to injunctive relief would be the same if these earlier findings were not adopted.

6. The constitutionally-required standards for providing mental health treatment are still unmet at the SCC in the following respects:

(a) There is still a need for additional staff training. New residential care staff should finish the orientation training before beginning work on the unit; both residential care and clinical staff should complete mental health treatment training within four months of commencing their employment at the SCC; and advanced training on the treatment of sexual deviance should be provided. No professional opinion supports the absence of such training.

(b) There is still no coherent and individualized treatment plan for each resident complete with understandable progress goals and a road map, to use Dr. Prentky's term, showing the way to improvement and release. Each such plan should include the components recognized as necessary for maximum treatment potential. Each resident who is willing to accept treatment should receive it. No professional opinion supports the absence of such plans or treatment.

(c) There is still inadequate provision at SCC for participation by residents' families in their rehabilitation. Successful treatment depends in part on morale and motivation, both of which have been damaged by unnecessary constraints on family visits. Defendants should set aside a room for visits by family members, should permit such visits with reasonable frequency, and should allow prompt telephone access to residents in cases of family emergency, consistent with security. No professional opinion supports less family participation than that described in this paragraph.

(d) The treatment environment at SCC has severely hampered any attempt to meet constitutional standards. Although McNeil Island affords a better physical facility than the old location at Monroe, the treatment space is inadequate and there is no suitable visiting space. In addition, the treatment environment is damaged by the location of SCC within the perimeters of a prison, the McNeil Island Correctional Center ("MICC"), operated by the Department of Corrections ("DOC"). The intertwining of MICC and SCC results in prison-like conditions and restrictions for SCC residents that have no therapeutic or security-based justification. All concerned, including defendants, recognize that this should not continue. SCC currently has 67 residents and projects a population of more than 150 by the year 2001. The space now used will not accommodate this growth. The only viable long-term solution appears to be, as the ATSA standard states, a separate "treatment-oriented facility that is similar to other settings for persons who are civilly committed in the state." Such a facility should be provided, either on McNeil Island or elsewhere, at the earliest possible time. In the meantime it is essential that steps be taken to reduce the negative effects of the current connection with MICC, as follows:

(i) Eliminate the routine strip searches of SCC residents following every visit. No such strip search policy was deemed necessary at SCC's prior location, and the policy has been followed at McNeil only because it is imposed by DOC on prisoners.

(ii) Eliminate the monitoring of residents' telephone calls and the bar on outgoing calls (other than collect).

(iii) Negotiate with MICC management to obtain better meal and activity schedules, which are now severely restricted, and to eliminate harassment of residents by prisoners.

(iv) Acquire more adequate space within the MICC complex, e.g., by taking over all of A Unit when new space is needed, with yard space adjacent thereto.

(e) To meet minimum constitutional standards the treatment environment must also be improved in the following respects:

(i) New living space should be used to provide some separation between residents in treatment and those who have harassed treatment recipients.

(ii) Fair and reasonable grievance procedures and behavior management plans must be adopted and implemented.

(iii) Reasonable opportunities for educational, religious, vocational/work, and recreational activities must be afforded to all residents. Such opportunities, even for those who reject treatment, are essential to a successful treatment environment.

(f) Program oversight is still insufficient because the SCC's advisory board, although it provides a valuable service, limits itself to policy and planning advice. Oversight must be provided both by an internal review process and by an external body either through a licensing organization or another entity.

7. The foregoing steps, and maintenance of progress made thus far, require defendants to bring a constitutionally adequate program into reality, not merely to describe it on paper.

8. The plaintiffs' claims for injunctive relief adjudicated at the hearing held on October 6-9, 1998, have been established to the extent, and only to the extent, reflected in the foregoing findings.

9. Laura McCollum, SCC's only female resident, was allowed by an order entered on May 2, 1997, to intervene as a plaintiff in C91-664WD for the limited purpose of participating in the administration and enforcement of the existing injunction. At the time, Ms. McCollum was confined pursuant to RCW ch. 71.09 with an otherwise all-male population at the Special Commitment Center, and was being treated together with male residents in group sessions; accordingly, the requirements of Fed. R. Civ. P. 24(a) that she have an interest in the subject matter of the litigation, that she be so situated that disposition of the action might as a practical matter impair her ability to protect that interest, and that her interest was not adequately represented by the existing parties, were deemed satisfied. At the hearing held on October 6-9, 1998, both sides presented substantial evidence concerning Ms. McCollum's treatment and conditions of confinement. On October 20, 1998, however, the Ninth Circuit vacated the order allowing intervention, holding that "McCollum's interest - though broadly analogous to that of the male plaintiffs seeking to vindicate their constitutional rights - is profoundly different and demands consideration separate from theirs." The injunction enforcement order relating to Ms. McCollum, entered herein on June 10, 1997, was accordingly reversed. The Court of Appeals noted that Ms. McCollum "is free to institute an independent § 1983 action on her constitutional claim." *Cunningham v. Weston*, --- F.3d ---, 1998 WL 727537 (9th Cir. 1998). Given the decision of the Court of Appeals, it is not possible to enter findings and conclusions as to Ms. McCollum at this point. She remains free to commence her own lawsuit in regard to the conditions of her confinement and treatment as a person civilly committed pursuant to RCW ch. 71.09. *See* Order on Motion of Laura McCollum's Counsel for Amicus Curiae Status (Dkt. # 1026).

V. CONCLUSIONS OF LAW

From the foregoing findings of fact, the court makes and enters the following conclusions of law:

1. The court has jurisdiction herein pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

2. In the *Sharp* cases, the evidence requires that injunctive relief be ordered in accordance with the findings of fact.

3. In the *Turay* case, plaintiffs' motion for contempt, and defendants' motion for release from the injunction, should be denied. The existing injunction should remain in force and be implemented in accordance with the findings of fact. Ordinarily, injunctive measures ordered against a state agency or official must be no broader than necessary to remedy the constitutional violation, but a remedy may go beyond the precise terms of the specific violation "when there is a record of past constitutional violations and violations of past court orders." *Gary v. Hegstrom*, 831 F.2d 1430, 1433 (9th. Cir. 1987) (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1247 (9th Cir. 1982)). This court may "order relief the Constitution would not of its own force initially require if such relief is necessary to remedy constitutional violations." *Gluth v Kansas*, 951 F.2d 1504, 1510, n.4 (9th Cir. 1991) (citing *Toussaint v. McCarthy*, 801 F.2d 1080, 1110 (9th Cir. 1986)).

4. The only defendants as to whom injunctive relief is necessary are Dr. Mark Seling and Dr. Robert Smith, the SCC superintendent and clinical director.

5. Dates should now be set for a further report by the special master and a hearing to determine whether the existing injunction in *Turay*, and the injunction now issued in *Sharp*, should be continued in force or dissolved.

VI. ORDER

1. Based upon the foregoing findings of fact and conclusions of law, the defendants Seling and Smith, in their official capacities, are hereby enjoined as follows:

(a) To carry out additional staff training at the SCC, with new residential care staff to finish the orientation training before beginning work on the unit, residential care and clinical staff to complete mental health training within four months of commencing their employment, and advanced training on the treatment of sexual deviance to be provided.

(b) To provide a coherent and individualized treatment program for each resident complete with understandable progress goals and a road map showing the way to improvement and release, such plan to include the components recognized as necessary for maximum treatment potential.

(c) To make adequate provision for participation by residents' families in rehabilitation efforts, including setting aside a room for visits by family members, permitting family visits with reasonable frequency, and allowing prompt telephone access to residents in cases of family emergency, consistent with security.

(d) Pending the construction of a separate treatment-oriented facility, to reduce the negative affects of the current connection with MICC by taking the following steps:

(i) Eliminate the routine strip searches of SCC residents following every visit;

(ii) Eliminate the monitoring of residents' telephone calls and the bar on outgoing calls (other than collect);

(iii) Negotiate with MICC management to obtain better meal and activity

schedules, and to eliminate harassment of residents by prisoners; and

(iv) Acquire more adequate space within the MICC complex, e.g., by taking over all of A Unit when new space is needed, with yard space adjacent thereto.

(e) To improve the treatment environment in the following respects:

(i) Use new living space to provide some separation between residents in treatment and those who have harassed treatment recipients;

(ii) Draft and implement fair and reasonable grievance procedures and behavior management plans; and

(iii) Afford reasonable opportunities to all residents for educational, religious, vocational/work, and recreational activities.

(f) To initiate and implement program oversight both by an internal review process and by an external body, either through a licensing organization or another entity.

(g) In the foregoing respects, and in others previously ordered, to take all reasonable steps to bring a constitutionally adequate program into reality rather than merely describing it on paper.

2. The special master will continue to serve pending further order of the court. A further report from her, using the process heretofore in effect, will be due on May 7, 1999. If the injunction is not dissolved earlier, a hearing as to compliance will be held commencing at 8:45 a.m. on May 18, 1999. Any party may move for contempt or dissolution of the injunction before the scheduled hearing.

The clerk is directed to send copies of this order to all counsel of record, the pro se parties, amici curiae, and the special master.

Dated: November 25, 1998.

/s/William L. Dwyer
William L. Dwyer
United States District Judge

[Filed December 23, 1998]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD G. TURAY, Plaintiff, v. MARK SELING, Ph.D., et al., Defendants.	NO. C91-664WD
JERRY R. SHARP, et al., Plaintiffs, v. DAVID B. WESTON, et al., Defendants.	NO. C94-121WD
RANDY PEDERSEN, et al., Plaintiffs, v. TIM HILL, et al., Defendants.	NO. C94-211WD
JOHN F. HALL, et al., Plaintiffs, v. LYLE QUASIM, et al., Defendants.	NO. C95-1111WD

RONALD PETERSEN, et al.,	) NO. C96-415WD
Plaintiffs,	) ORDER AMENDING
v.	) ORDER OF
	) NOVEMBER 25, 1998,
WILLIAM DEHMER, et al.,	) DENYING MOTION FOR
	) STAY PENDING APPEAL,
	) AND RENOTING MOTION
	) TO DEFER AWARD OF
Defendants.	) ATTORNEYS' FEES

Following an evidentiary hearing on injunction compliance in the *Turay* case (C91-664WD), consolidated with the trial of the injunctive relief claims in the *Sharp* cases (C94-121WD, etc.), the court on November 25, 1998, entered Findings of Fact, Conclusions of Law, and Order Re Injunctive Relief ("Order") (Dkt. # 1026 in *Turay*, Dkt. # 582 in *Sharp*). The defendants now move for a stay pending appeal, and both sides seek interpretation of the Order's provision regarding strip searches. These issues have been fully briefed, and the briefs and additional declarations filed, together with the earlier record, have been fully considered.

A notice of appeal was filed on December 21, 1998. Fed. R. Civ. P. 62(c) provides that "[w]hen an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal on such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." The factors relevant to exercising discretion on a motion for a stay pending appeal are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuing the stay will substantially injure other parties interested in the proceeding, and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

The present motion seeks to stay the entire Order, and if granted would vitiate the injunction that has been in place in *Turay* for four and a half years while suspending the injunctive relief awarded to the *Sharp* plaintiffs following the October 1998 trial. In a case where men are involuntarily confined under conditions found to be in part unconstitutional, that would be a drastic remedy. The absence of constitutionally adequate mental health treatment at the Special Commitment Center ("SCC") has been found by the jury in the *Turay* trial, by this court in the post-verdict *Turay* proceedings, by the Superior Court of the State of Washington for King County following an evidentiary hearing in a case brought by another resident,[1] by this court in a series of hearings and site visits while the injunction has been in force, by the eminently qualified special master, and by independent experts who testified or whose opinions were placed in evidence at the recent hearing. Defendant Seling, the SCC's current superintendent, testified at the hearing held in the fall of 1997 that the injunction had been necessary, a recognition which boded well for the attainment of full compliance and early dissolution of the injunction. The court

[1] In Cause No. 93-2-09933-9 in the Superior Court of the State of Washington for King County, the Hon. Sharon S. Armstrong found on November 15, 1994, that SCC was depriving a resident of due process by failing to afford constitutionally adequate treatment, citing "(1) Lack of sufficient staff trained, experienced and certified in treatment of sex offenders[;] (2) [l]ack of a comprehensive treatment program which includes timely deviancy evaluations, highly structured treatment manuals, adequate scheduling of pre-group, core group, and psycho-educational modules, significant employment opportunities within the facility, involvement of family members in treatment, and a conditional release and aftercare program[;] (3) [l]ack of individual treatment plans which include objective benchmarks of improvement so as to document, measure and grade an individual's progress in therapy[;] and (4) [l]ack of training and supervision of staff, resulting in verbal abuse of residents, lack of trust and rapport with residents and staff, and a milieu counterproductive to treatment." See also Dkt. # 130 in Sharp. These findings were adopted by stipulation as the law of the case in Sharp. Dkt. # 537, p. 3.

has denied plaintiffs' repeated motions for contempt in the belief that defendants were making good faith efforts to achieve compliance. A tremendous amount of work has been invested by the parties, counsel, special master, and the court to accomplish an inherently difficult task made more difficult by the long-standing doubt (finally resolved by the Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346 (1992)) over the constitutionality of civil commitment statutes such as RCW ch. 71.09 and by the State of Washington's failure, to date, to provide a commitment center separate from a prison. To suspend these efforts at this point for a period of months while appellate review proceeded, absent a clear showing that a stay pending appeal was justified, would be a disastrous mistake.

The defendants argue, first, that the relief specified in the Order goes beyond the scope of the *Turay* injunction. A review of the original injunction and the succeeding court orders, however, makes clear that every part of the relief specified in the Order comes within one or more paragraphs of the original injunction. *See also Gluth v. Kangas*, 951 F.2d 1504, 1510 n.4 (9th Cir. 1991). The argument also overlooks the fact that the October 1998 evidentiary hearing constituted the trial of the claims for injunctive relief in the *Sharp* cases. The issues framed by the pleadings and by stipulation to be tried in *Sharp* plainly encompass the findings, conclusions, and order entered on November 25, 1998.

The Order is eighteen pages in length, and the concluding section reads as follows:

> 1. Based upon the foregoing findings of fact and conclusions of law, the defendants Seling and Smith, in their official capacities, are hereby enjoined as follows:
>
> (a) To carry out additional staff training at the SCC, with new residential care staff to finish the orientation training before

> beginning work on the unit, residential care and clinical staff to complete mental health training within four months of commencing their employment, and advanced training on the treatment of sexual deviance to be provided.
>
> (b) To provide a coherent and individualized treatment program for each resident complete with understandable progress goals and a road map showing the way to improvement and release, such plan to include the components recognized as necessary for maximum treatment potential.
>
> (c) To make adequate provision for participation by residents' families in rehabilitation efforts, including setting aside a room for visits by family members, permitting family visits with reasonable frequency, and allowing prompt telephone access to residents in cases of family emergency, consistent with security.
>
> (d) Pending the construction of a separate treatment-oriented facility, to reduce the negative affects of the current connection with MICC by taking the following steps:
>
> (i) Eliminate the routine strip searches of SCC residents following every visit;
>
> (ii) Eliminate the monitoring of residents' telephone calls and the bar on outgoing calls (other than collect);
>
> (iii) Negotiate with MICC management to obtain better

meal and activity schedules, and to eliminate harassment of residents by prisoners; and

(iv) Acquire more adequate space within the MICC complex, e.g., by taking over all of A Unit when new space is needed, with yard space adjacent thereto.

(e) To improve the treatment environment in the following respects:

(i) Use new living space to provide some separation between residents in treatment and those who have harassed treatment recipients;

(ii) Draft and implement fair and reasonable grievance procedures and behavior management plans; and

(iii) Afford reasonable opportunities to all residents for educational, religious, vocational/ work, and recreational activities.

(f) To initiate and implement program oversight both by an internal review process and by an external body, either through a licensing organization or another entity.

(g) In the foregoing respects, and in others previously ordered, to take all reasonable steps to bring a constitutionally adequate program into reality rather than merely describing it on paper.

2. The special master will continue to serve pending further order of the

court. A further report from her, using the process heretofore in effect, will be due on May 7, 1999. If the injunction is not dissolved earlier, a hearing as to compliance will be held commencing at 8:45 a.m. on May 18, 1999. Any party may move for contempt or dissolution of the injunction before the scheduled hearing.

Order at 16-18.

Paragraph 1(a) of the Order concerns additional staff training. It is based upon a finding that such training is necessary, and essentially adopts a recommendation of the special master. The only objection to it is that it is too rigid. The intent was and is that defendants would have reasonable flexibility in regard to the scope of initial orientation and subsequent training. No amendment or stay would be justified.

Paragraph 1(b) requires "a coherent and individualized treatment program for each resident complete with understandable progress goals and a roadmap showing the way to improvement and release." This element is called for unanimously by all professionals who have testified. There is no reason that the progress made to date cannot be expanded to achieve full and prompt compliance.

Paragraph 1(c) concerns family visits and participation in rehabilitation efforts, which also is undisputed as a necessary component of treatment. The objection is to the requirement of "setting aside a room for visits by family members" on the ground that the prison with which SCC is connected lacks space to do this. The means of compliance will be up to defendants, and a reasonable time will be provided. But the gross inadequacy of the present arrangement cannot be justified simply on the basis of budgetary or structural inconvenience.

Paragraph 1(d) provides that "[p]ending the construction of a separate treatment-oriented facility" certain steps be taken to reduce the negative effects SCC's connection with the McNeil Island Correctional Center ("MICC"). This part of the order has brought the most strenuous objections, but the objections are almost entirely from the Department of Corrections ("DOC") which operates the MICC, and they concern not the SCC as such but DOC's operation of a *prison*.[2] The court has not ordered the DOC to do anything. It is true that RCW ch. 71.09 has the dual purpose of secure confinement and treatment, but it is manifestly untrue that the statute requires (or that the Constitution would permit) the return of these civilly-committed residents to prison. Defendants make the remarkable argument that "[t]he fact that the SCC's program is operated within the perimeter of a prison, and in fact is *mandated* to do so by the Washington Legislature by necessity creates an interface with the Department of Corrections." Defendants' Memorandum in Support of Motion for Stay, p. 9. To the contrary, the statute says only that the "facility shall not be located on the grounds of any state mental facility or rehabilitation center." RCW 71.090.060(3). The Washington Supreme Court, in upholding the statute against ex post facto and double jeopardy challenges, emphasized that the SCC was *not* to be a prison or under DOC's control:

> Persons committed are placed in the custody of the DSHS and housed at a DSHS treatment facility. RCW 71.09.060(1); WAC 275-155. The Department of Corrections has no role in caring for committed sex predators.

In re Young, 122 Wn. 2d 1, 19, 857 P.2d 989 (1993).

---

[2] Although the DOC is not a separate legal entity but rather an agency of the State of Washington, its counsel was allowed to file a brief amicus curiae and its superintendent has filed a declaration.

Yet the present motion, insofar as it deals with security and physical facilities, is based on DOC's asserted needs for its prison, and demonstrates the correctness of the testimony of plaintiffs' expert Dr. Craig Haney in open court on October 6, 1998:

> The first is that as I suggested earlier, the Department of Corrections very clearly dominates physically, administratively, procedurally and psychologically the MICC and really in many significant ways encompasses the SCC. It is, for all intents and purposes, a prison. Feels like a prison, looks like a prison, and for the most part operates like a prison.
>
> In my opinion, in addition, in some not insignificant ways, the SCC residents actually have fewer, not more, liberties in comparison to the Department of Corrections prisoners.
>
> It is also my opinion that these things collectively represent impediments to any possibility that any significant therapy or treatment can be done under the present circumstances and in addition, because of the quality of life which is created there and the conditions that have been created there, independently represent or present me with a concern about potential deterioration of people who are kept in the SCC unit under the current circumstances.

Trial testimony at 122-23.

The MICC superintendent asks in her declaration that the court defer to her professional judgment about the needs of the prison. The difficulty with the argument is that SCC is required by constitutional law *not* to be a prison.

Paragraph 1(d) assumes that a separate treatment-oriented facility will be built either on McNeil Island or elsewhere, since that is the plan of defendants and others in state government. Obviously, funding will have to be obtained but the need for funding cannot justify a systematic depravation of constitutional rights. *See, e.g., Miller v. Carlson*, 768 F. Supp. 1341, 1343 (N.D. Cal. 1991), and cases cited.[3] In the meantime, as an alternative to ordering more drastic remedies, the court has ordered that certain steps be taken to improve the treatment environment. The first is elimination of the routine strip searches of SCC residents following every visit, even attorney visits. The professional opinion is unanimous that these are not just degrading but profoundly inimical to successful treatment. Defendant Smith has referred to them as "an abomination." While the SCC was at Monroe - a period of several years - the policy was to conduct strip searches only upon reasonable suspicion that contraband had been passed. Routine strip searches following every visit have been instituted only since the April 1998 move to McNeil Island, and only because DOC requires these for the prison.

Notwithstanding the Washington Supreme Court's determination that the DOC has "no role in caring for committed sex predators," *Young, supra*, DOC now seeks approval of random strip searches of up to fifty percent of the population, while objecting even to that limitation. Both sides ask for clarification of this part of the Order. The evidentiary record shows that random strip searches would be as destructive as routine strip searches in the SCC setting. As

[3] Whether to adopt a sexual predator civil-commitment statute in the first place is, of course, optional with each state. A recent survey showed that eighteen states have such statutes while thirty-two do not. *See* Kimberly A. Dorsett, *Kansas v. Hendricks: Marking the Beginning of a Dangerous New Era in Civil Commitment*, 48 Depaul L. Rev. 113, 159 ns. 10 & 11 (1998). A state that has adopted such a program cannot avoid its constitutional duties to those committed by choosing to locate the facility on prison grounds and then contending that the prison's needs must be paramount.

far as SCC is concerned, there is no justification for either routine or random strip searches, and no doubt of their harmful effect on the treatment environment.[4] The intent of this part of the order was and is that routine or random strip searches of SCC residents will not be made, and that such searches will be made in accordance with the previous policy, i.e., upon reasonable suspicion that contraband has been passed. In view of DOC's security concerns about the prison, and to afford time to consider any appropriate changes in the interface between SCC and MICC, routine strip searches may continue for thirty more days following the date of this order, at which time defendants are enjoined to cease making them and to conduct strip searches only upon reasonable suspicion, as stated above. The Order is amended accordingly.

Paragraph l(d)(ii) of the Order calls for eliminating the monitoring of residents' telephone calls and the bar on outgoing calls (other than collect). The importance of making this change has been established by professional opinion without substantial contradiction. The objection, again, comes from DOC and concerns its operation of the prison. Only the SCC residents, however, would be affected by the change, and there appears to be no technical or mechanical factor that would make it difficult. In fact, the record shows that a telephone having this capacity is already on the premises, but is restricted to use by counsel. No change will be made in this requirement with the understanding, of course, that a reasonable time is allowed for compliance.

Paragraph l(d)(iii) calls upon defendants to "[n]egotiate with MICC management to obtain better meal and activity schedules, and to eliminate harassment of residents by

[4] Defendant Seling states in a declaration that he believes narcotic use by residents was more common at Monroe than at McNeil Island. There is no evidence, however, that any such difference was due to strip search policies.

prisoners." Defendants and the MICC superintendent state that they do not know what is meant by "better." In this context, that word means meal and activity schedules that are more ample and more attuned to the rhythms of ordinary life, as contrasted with the artificial and restricted schedules that have prevailed to date. Recognizing the difficulties of administration, the order requires only that defendants "negotiate" with MICC management to these ends; all concerned with SCC will hope for success in the negotiations.

Paragraph l(d)(iv) directs defendants to "[a]cquire more adequate space within the MICC complex, e.g., by taking over all of A Unit when new space is needed, with yard space adjacent thereto." There is no doubt that more space is needed; even defendants' expert Dr. Prentky testified on October 7, 1998, that the treatment space is "woefully inadequate." (Testimony transcript at 139.) The intent was to order that the defendants *negotiate* to acquire, and the wording is hereby amended accordingly. "E.g.," of course, means "for example"; how and where additional space is acquired will be up to defendants and others in state government. The point for purposes of these cases is that constitutionally adequate mental health treatment requires adequate space for living, treatment, and other activities, and such space must be provided.

Paragraph l(e) calls for further steps to improve the treatment environment, the first, in subparagraph (i), being to "[u]se new living space to provide some separation between residents in treatment and those who have harassed treatment recipients." The necessity for this is undisputed.

Paragraph 1(e)(ii) directs defendants to "[d]raft and implement fair and reasonable grievance procedures and behavior management plans." There is no question that this step is essential or that it remains to be fully carried out.

Paragraph 1(e)(iii) concerns "reasonable opportunities to all residents for educational, religious, vocational/work,

and recreational activities." This is also an undisputed element; the means of fulfilling it is left to defendants' discretion.

Paragraph 1(f) calls for "program oversight both by an internal review process and by an external body, either through a licensing organization or another entity." The need for this, and its absence at this point, are undisputed. A reasonable time will be allowed for compliance.

Paragraph 1(g) states: "In the foregoing respects, and in others previously ordered, to take all reasonable steps to bring a constitutionally adequate program into reality rather than merely describing it on paper." This has been mentioned in earlier orders and remains of prime importance. Compliance must take place within the SCC, not merely in paper plans and programs presented to the court.

For the reasons stated, the Order of November 25, 1998, is amended in part in accordance with the foregoing. As for the requested stay pending appeal, defendants have not made a strong showing that they are likely to succeed on the merits, or that they will be irreparably injured absent a stay. To issue a stay would substantially injure the plaintiffs and the public interest in assuring that constitutional rights are protected. The factors listed in *Hilton v. Braunskill*, *supra*, weigh in favor of keeping the injunction in place pending further order of the court, and the motion for a stay pending appeal is accordingly denied. The defendants' motion to defer any award of attorneys' fees will be noted for January 8, 1999, the noting date for plaintiffs' motion for that relief.

The clerk is directed to send copies of this order to all counsel of record, the pro se parties, amici curiae, and the special master.

Dated: December 23, 1998.

/s/William L. Dwyer
William L. Dwyer
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 99-1185

Mark Seling, Superintendent, Special Commitment Center,

Petitioner

v.

Andre Brigham Young

ORDER ALLOWING CERTIORARI. Filed March 20, 2000.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

March 20, 2000

SUPREME COURT OF THE UNITED STATES

No. 99-1185

Mark Seling, Superintendent, Special Commitment Center,

Petitioner

v.

Andre Brigham Young

ON CONSIDERATION of the motion of respondent for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion, be, and the same is hereby, granted.

March 20, 2000

Wash. Rev. Code 9A.76.120. Escape in the second degree

(1) A person is guilty of escape in the second degree if:

(a) He or she escapes from a detention facility;

(b) Having been charged with a felony or an equivalent juvenile offense, he or she escapes from custody; or

(c) Having been found to be a sexually violent predator and being under an order of conditional release, he or she leaves the state of Washington without prior court authorization.

(2) Escape in the second degree is a class C felony.

[1995 c 216 § 15; 1982 1st ex.s. c 47 § 24; 1975 1st ex.s. c 260 § 9A.76.120.]

Wash. Rev. Code 10.77.220. Incarceration in correctional institution or facility prohibited—Exceptions

No person confined pursuant to this chapter shall be incarcerated in a state correctional institution or facility: *Provided*, That nothing herein shall prohibit confinement in a mental health facility located wholly within a correctional institution. Confinement in a county jail or other local facility while awaiting either placement in a treatment program or a court hearing pursuant to this chapter is permitted for no more than seven days.

Enacted by Laws 1973, 1st Ex.Sess., ch. 117, § 22, eff. July 1, 1973. Amended by Laws 1974, Ex.Sess., ch. 198, § 17, eff. May 6, 1974; Laws 1982, ch. 112, § 3.

Supreme Court, U.S.
FILED
MAY 25 2000
CLERK

NO. 99-1185

IN THE SUPREME COURT OF THE UNITED STATES

MARK SELING, Superintendent,
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), this Court held that the Kansas law authorizing commitment of sexually violent predators is civil in nature and does not violate the double jeopardy or *ex post facto* clauses. The Kansas law was modeled on Washington's Sexually Violent Predator Statute and the two laws are substantially similar. This case presents the following question regarding Washington's Sexually Violent Predator Statute:

Whether an otherwise valid civil statute can be divested of its civil nature and held to violate the double jeopardy and *ex post facto* clauses because the administrative agency operating the commitment facility fails to provide for treatment and other conditions of confinement mandated by statute at some time during the individual's commitment.

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The Ninth Circuit's Order Amending Opinion And Denying Rehearing And Amended Opinion is reported at 192 F.3d 870 (9th Cir. 1999), and is included in the Appendix To The Petition For A Writ Of Certiorari (Pet. App.) at 1a-13a. The order of the district court is unpublished. Pet. App. at 15a-27a. The opinion of the Washington Supreme Court is reported at 122 Wash. 2d 1, 857 P.2d 989 (1993). Pet. App. at 28a-102a.

JURISDICTION

This Court's jurisdiction to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C. § 1254(1). The judgment of the Ninth Circuit was entered May 20, 1999. On September 16, 1999, in response to a timely motion for rehearing en banc, the Court of Appeals issued an Order Amending Opinion And Denying Rehearing And Amended Opinion. On November 30, 1999, Justice O'Connor granted an extension of time in which to file a Petition For A Writ Of Certiorari to and including January 14, 2000. The Petition For A Writ Of Certiorari was filed January 14, 2000, and this Court granted the petition January 24, 2000.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The *Ex Post Facto* Clause of Article I, Section 10, provides that "[n]o State shall . . . pass any . . . ex post facto Law . . . ."

The provisions of Washington's Sexually Violent Predators Statute (Statute), Wash. Rev. Code 71.09, as it existed when respondent was committed, are set forth in the Petitioner's Appendix at pages 103a-111a. The Statute was subsequently amended, and the current version of the law is set forth in the Petitioner's Appendix at pages 112a-135a.

STATEMENT

This case raises a fundamental question involving this Court's civil versus criminal jurisprudence under the double jeopardy and *ex post facto* clauses: whether Washington's facially valid civil commitment law may be divested of its civil nature and be held to violate the double jeopardy and *ex post facto* clauses, if the commitment facility fails to provide adequate treatment or other conditions of confinement required by the law.

Both the Washington Supreme Court and the Ninth Circuit held that the statute, on its face, is a civil commitment law that is not punitive in purpose or effect. *In re Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993), Pet. App. at 28a-102a; *Young v. Weston*, 192 F.3d 870, 874 (9th Cir. 1999), Pet. App. at 1a-13a, 7a ("*Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses"). There is no dispute, in this Court, that respondent Young is dangerous and suffers from a mental abnormality that makes him likely to engage in predatory acts of sexual violence and that Young's commitment was proper and met constitutional requirements. There also is no dispute that Washington's law requires adequate care and individualized treatment. It is Young's claim that such care and treatment are not being provided.

A. Washington's Sexually Violent Predators Statute

The Washington Statute providing for the civil commitment of sexually violent predators served as the model for the Kansas Act that was upheld by the Court in *Kansas v. Hendricks*, 521 U.S. 346, 387 (1997) (Breyer, J., dissenting). The Washington and Kansas statutes are identical in all relevant respects except that, unlike the Kansas Act upheld in *Hendricks*, Washington's Statute authorizes the treatment of persons

committed under its terms in settings less restrictive than total confinement. Wash. Rev. Code § 71.09.090[1], Pet. App. at 124a.

As with the Kansas Act, the Washington Statute defines a "sexually violent predator" as a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility". Wash. Rev. Code § 71.09.020(1), Pet. App. at 114a. A "mental abnormality" is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others". Wash. Rev. Code § 71.09.020(2), Pet. App. at 114a.

Under the Statute, the county prosecutor (or Attorney General acting on the prosecutor's behalf) may file a petition in superior court alleging that a person is a sexually violent predator. Wash. Rev. Code § 71.09.030, Pet. App. at 117a. Within 72 hours of the petition's filing, a hearing is held to determine whether there is probable cause to detain the person pending trial. Wash. Rev. Code § 71.09.040(2), Pet. App. at 118a. The Statute provides for a right to trial within 45 days of the probable cause determination. Wash. Rev. Code § 71.09.050(1), Pet. App. at 119a.

Throughout the trial proceedings, the detained person is entitled to counsel and to have qualified "experts or professional persons" perform an evaluation on his or her behalf. Wash. Rev. Code § 71.09.050(2), Pet. App. at 119a. The Statute allows for trial by jury and requires a unanimous verdict in order for the detained person to be adjudged a sexually violent predator. Wash. Rev. Code §§ 71.09.050(3), .060(1), Pet. App. at 120a. At trial, the State must prove beyond a reasonable doubt that the

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[1] We cite to the current version of the Statute, except as otherwise indicated.

person is a sexually violent predator. Wash. Rev. Code § 71.09.060(1), Pet. App. at 120a.

If the jury finds the person to be a sexually violent predator, he or she is committed to the custody of the Department of Social and Health Services (DSHS) "for control, care, and treatment" in a secure facility until the person's mental abnormality has so changed that he or she is safe to be at large, or to be conditionally released to treatment in an environment less restrictive than total confinement. Wash. Rev. Code § 71.09.060(1), Pet. App. at 120a.

Each person committed under the Statute is entitled annually to a current evaluation of his or her mental condition, danger to re-offend in a sexually violent manner, and amenability to treatment in a less restrictive setting than total confinement. Wash. Rev. Code § 71.09.070, Pet. App. at 122a. The statute requires that a report of this evaluation be provided to the committed individual and to the committing court. Wash. Rev. Code § 71.09.070, Pet. App. at 122a. At a minimum, Washington's Statute entitles a person committed as a sexually violent predator to an annual judicial review of the commitment. Wash. Rev. Code § 71.09.090(2), Pet. App. at 125a. In addition, the committed person may petition the court for an unconditional discharge or treatment in a less restrictive setting. Wash. Rev. Code § 71.09.090, Pet. App. at 124a.

Although a person adjudged a sexually violent predator is involuntarily committed, the Statute preserves the committed person's civil rights:

> "Any person subjected to restricted liberty as a sexually violent predator pursuant to this chapter shall not forfeit any legal right or suffer any legal disability as a consequence of any actions taken or orders made, other than as specifically provided in this chapter." Wash. Rev. Code § 71.09.080(1), Pet. App. at 122a.

Consistent with its purpose of committing sexually violent predators for "control, care, and treatment", the Statute

specifically requires that "[*a*]*ny person committed pursuant to this chapter has the right to adequate care and individualized treatment*." Wash. Rev. Code § 71.09.080(2), Pet. App. at 122a (emphasis added).[2]

The Statute does not specify a particular facility in which statutorily mandated control, care, and treatment is to be provided. It prohibits incarceration in a state correctional facility, but as was the case in Kansas, confinement in a mental health facility that is located within a correctional institution is authorized.[3] Wash. Rev. Code § 71.09.060(3), Pet. App. at 121a; Wash. Rev. Code § 10.77.220, Joint Appendix (JA) at 155; *Hendricks*, 521 U.S. at 379 (Breyer, J., dissenting). DSHS operates a secure facility for this purpose called the "Special Commitment Center" (SCC).[4] The SCC is located on the grounds of a medium security prison, but it is segregated from the prison and is operated by DSHS, not by Washington's criminal corrections agency.

B. Proceedings Relating To Young

1. State Court Proceedings

The State of Washington initiated sexually violent predator commitment proceedings against Young in 1990,

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[2] The requirement for adequate care and individualized treatment in the current version of the Statute carries over from the original law that required that "[t]he involuntary detention or commitment of persons under this chapter shall conform to constitutional requirements for care and treatment." Wash. Rev. Code § 71.09.080 (1990), Pet. App. at 109a.

[3] Until 1998, the SCC was located within a Department of Corrections facility in Monroe, Washington. It is now located on McNeil Island, within the boundaries of the McNeil Island Corrections Center.

[4] Not all sexually violent predators are detained and treated at the SCC. Several individuals, having been deemed safe to reside in community treatment, reside in half-way house-type placements or in private residences. In addition to receiving on-going treatment, these individuals are subject to monitoring requirements. *See, e.g., In re Peterson,* Snohomish Cy. Cause No. 92-2-05722-9; *In re Aqui,* King Cy. Cause No. 92-2-23217-1.

under the State's then newly enacted Statute. JA at 19. The evidence presented in the commitment proceedings focused on Young's extensive history of sexual violence and the mental condition that made similar acts likely in the future.

Young's history included convictions for six violent rapes of adult female strangers over the course of thirty-one years, during the intermittent periods when Young was free from incarceration. *In re Young*, 122 Wash. 2d at 13-14, Pet. App. at 32a-33a; JA at 20-23. The State's expert witness, Dr. Dreiblatt, testified that Young suffered from a mental abnormality – a severe paraphilia that would be classified as either paraphilia sexual sadism or paraphilia not otherwise specified (rape), and a severe personality disorder, with primarily paranoid and anti-social features. *Id.* at 15, 34a, 23. Dr. Dreiblatt further testified that Young's severe paraphilia, his personality disorder, the length of time spanning his crimes, the number of his offenses, his use of weapons in committing rape, his persistent denial of the rapes, and his lack of remorse or empathy for his victims made him likely to commit further sexually violent acts. *Id.* at 15-16, 34a-35a, 23.

After weighing the evidence, a unanimous jury determined beyond a reasonable doubt that Young was a sexually violent predator. *In re Young*, 122 Wash. 2d at 16, Pet. App. at 35a. An order committing Young to the "control, care, and treatment" of DSHS was entered by the trial court. JA at 30. DSHS placed Young in the SCC.

Young appealed his commitment directly to the Washington Supreme Court, challenging the constitutionality of the Statute on a variety of grounds, including double jeopardy and *ex post facto*. *In re Young*, 122 Wash. 2d at 10-11, Pet. App. at 29a. Young also alleged errors specific to his commitment proceedings. *Id.* In August 1993, the court upheld the constitutionality of Washington's Sexually Violent Predators Statute in *In re Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993). The court rejected Young's double jeopardy and *ex post facto* challenges, applying the two-tiered analysis reflected

in *Allen v. Illinois*, 478 U.S. 364 (1986), and *United States v. Ward*, 448 U.S. 242 (1980), and subsequently reaffirmed in *Hendricks*.

First, the Washington Supreme Court reviewed the Statute and its legislative history and concluded that "[b]oth the language of the Statute and the legislative history evidence a clear intent to create a civil scheme." *In re Young*, 122 Wash. 2d at 19, Pet. App. at 38a. The court then applied the factors established in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), to consider whether the "purpose and effect" of the Statute also evidenced a civil legislative scheme. The court concluded that the *Kennedy* factors weighed "heavily on the side of a finding that this Statute is civil", and held that the Statute "is primarily concerned with incapacitation and treatment". *In re Young*, 122 Wash. 2d at 21-22, Pet. App. at 41a-42a.

The Washington Supreme Court next considered and rejected Young's challenges specific to his commitment proceedings. The court then remanded the case for consideration of whether a less restrictive alternative to total confinement would be appropriate in Young's case.[5] *Id.* at 60, 87a. Young did not seek review by this Court of the Washington Supreme Court's decision. Young did file a petition for a writ of habeas corpus.

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[5] The initial version of Washington's Statute did not provide for consideration of commitment less restrictive than total confinement. The Washington Supreme Court held in *In re Young* that equal protection required such consideration. *In re Young*, 122 Wash. 2d at 47, Pet. App. at 72a-73a. The Washington Legislature subsequently amended the Statute to specifically provide for consideration of less restrictive alternatives. 1995 Wash. Laws, ch. 216.

On remand, a jury unanimously determined that Young should remain confined in a secure facility. Young has appealed this verdict, and his appeal is pending in the Washington Court of Appeals. *In re Young*, Wash. Ct. of Appeals Div. I Cause No. 34931-7-I.

2. The *Turay* Proceeding

Before turning to Young's habeas corpus petition, a separate piece of litigation upon which Young relied in his "as applied" challenge (and referenced in opposition to certiorari in this case) should be noted. In 1991, shortly after enactment of the Statute, another resident of the SCC, Richard Turay, brought suit under 42 U.S.C. § 1983, alleging unconstitutional conditions of confinement and inadequate treatment at the SCC. *Turay v. Seling*, No. C91-664WD (W.D. Wash.), JA at 64-65. In 1994, following a trial on the merits, a federal jury rejected all but one of Turay's claims – i.e., that the SCC defendants had failed to provide constitutionally adequate mental health treatment. JA at 64-65. In June 1994, based on the jury's verdict, the federal district court entered an injunction requiring the SCC to bring its treatment program into compliance with constitutional standards. Noting that the Constitution requires the State to provide a person civilly committed "with access to mental health treatment which gives him a realistic opportunity to be cured or to improve the mental condition for which he was confined" (JA at 65), the injunction directed the SCC defendants to (1) to provide for initial and ongoing training and hiring of competent therapists; (2) to implement strategies to improve trust and rapport between residents and treatment providers; (3) to implement a therapy program that includes all professionally recognized therapy components; (4) to develop and maintain individualized treatment plans that include objective benchmarks of improvement; and (5) to provide a psychologist or psychiatrist expert in diagnosis and treatment of sex offenders to supervise and consult with the treatment staff. JA at 67.

The *Turay* injunction remains in effect, and the district court has been diligent in enforcing its terms. The court appointed a special master to assist the SCC defendants in achieving compliance and to report to the court on compliance. JA at 11. The court also has conducted periodic evidentiary hearings concerning compliance.

In November 1999, dissatisfied with the pace of improvement efforts, the district court held the SCC defendants in contempt for failing to take all reasonable steps to comply with the injunction and ordered coercive monetary sanctions to commence as of May 1, 2000, unless compliance or substantial compliance was sooner achieved. Br. Opp'n App. B. In its subsequent and most recent review hearing in April 2000, the district court found that the defendants "have made a genuine and sustained effort to bring the SCC program into compliance with the injunction" and that compliance is approaching the point of being substantially complete. The court held in abeyance the imposition of the monetary sanctions pending the outcome of a further hearing on compliance in December 2000. Lodged Order at 9-10.[6]

3. Young's Federal Court Proceedings

Following the decision of the Washington Supreme Court, Young filed a Petition For Writ Of Habeas Corpus in federal district court for the Western District of Washington under 28 U.S.C. § 2254. On August 25, 1995, the federal district court held the Statute unconstitutional on double jeopardy, *ex post facto*, and substantive due process grounds, but stayed Young's release. Pet. App. at 15a. The State appealed to the Ninth Circuit. While the State's appeal was pending, this Court issued its decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997). The Ninth Circuit then entered an order remanding this case to the district court for reconsideration in light of *Hendricks*.

On remand, the district court dismissed Young's petition, upholding the Statute under *Hendricks* and rejecting all of Young's claims. Pet. App. at 16a. The district court rejected Young's newly formulated "as applied" double

[6] The district court's most recent order and the most recent report of the special master have been lodged with this Court. Findings Of Fact, Conclusions Of Law, And Order Re Motions Heard April 18-21, 2000, *Turay v. Seling*, No. C91-664WD (W.D. Wash.); Seventeenth Report Of The Special Master, *Turay v. Seling*, No. C91-664WD (W.D. Wash.).

jeopardy and *ex post facto* challenges, noting that in *Hendricks* the Court had focused on the face of the statute and had found Kansas' statute non-punitive. Pet. App. at 16a-17a. Young appealed to the Ninth Circuit. Pet. App. at 4a.

On appeal, the Ninth Circuit determined that, because the Kansas Act "was modeled on and is substantially similar to the Washington statute, *Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses". *Young v. Weston*, 192 F.3d at 874, Pet. App. at 7a. The court also rejected each of Young's allegations of error with respect to his commitment proceedings. *Id.* at 876, 12a-13a. Nonetheless, the Ninth Circuit reasoned that "*Hendricks* does not preclude the possibility that the Washington statute, *as applied*, is punitive", and concluded that "[a]ctual conditions of confinement may divest a facially valid statute of its 'civil' label[.]" *Id.* at 874, 7a-8a (italics theirs).

The court rejected the State's argument that, pursuant to *Hudson v. United States*, 522 U.S. 93, 100, 101 (1997), characterization of a statute as civil or criminal is determined in relation to the statute on its face, and not with regard to the sanction imposed in a particular case. In a footnote, the Ninth Circuit purported to distinguish *Hudson* on the basis that it involved "monetary penalties and occupational disbarment", whereas "this case involves confinement". *Young v. Weston*, 192 F.3d at 874 n.4, Pet. App. at 7a n.4. The Ninth Circuit asserted that "the Supreme Court has always looked to the actual conditions of confinement" in cases considering the question of whether confinement is criminal or civil. *Id.*

The Ninth Circuit determined that Young had alleged facts, which, if proved, would establish the punitive nature of his confinement and would entitle him to relief.[7] *Id.* at 874-75,

[7] Although the court did not specify precisely the nature of the relief to which Young might be entitled, Young has consistently maintained that he is entitled to release. JA at 76.

8a. The court remanded the case for an evidentiary hearing on Young's double jeopardy and *ex post facto* claims. *Id.* at 877, 13a. The State filed a timely petition for rehearing en banc, which was denied.

This Court granted the State's Petition For A Writ Of Certiorari March 20, 2000. JA at 152. Young did not file a cross petition.

SUMMARY OF ARGUMENT

1. The double jeopardy and *ex post facto* clauses apply exclusively to criminal proceedings and punishments. To determine whether these criminal protections apply to a particular law, this Court has developed a two-part test to judge whether the law is civil or criminal. In *Hudson v. United States*, 522 U.S. 93 (1997), the Court rejected an "as applied" approach to determining the civil or criminal character of a law and confirmed that the civil or criminal nature of a law is determined on its face. Applying the same two-part test in *Kansas v. Hendricks*, 521 U.S. 346 (1997), this Court ruled that the Kansas sexually violent predator act, on its face, is a civil law not subject to the double jeopardy and *ex post facto* clauses. Washington's Sexually Violent Predators Statute is virtually identical to the Kansas Act.

2. Despite the facial validity of Washington's Statute, the Ninth Circuit held that the Statute could be divested of its civil nature and converted into a criminal statute if Young demonstrates that his conditions of confinement are punitive. Contrary to *Hendricks* and *Hudson*, the Ninth Circuit ruled that, with regard to laws involving confinement, the civil versus criminal character of the law is determined by an "as applied" test and not on the face of the law. In support of this claim, the Ninth Circuit cited, without analysis, *Hendricks*, *Allen v. Illinois*, 478 U.S. 364 (1986), and *Bell v. Wolfish*, 441 U.S. 520 (1979). These decisions do not support the Ninth Circuit. In each, the civil or criminal nature of the statute in question was determined on the face of the law.

3. The facial approach to the civil versus criminal test reaffirmed in *Hudson*, is consistent with the purpose of the test, the purpose of the double jeopardy clause, and the language of the *ex post facto* clause. The purpose of the civil versus criminal inquiry is to prevent legislative bodies from placing a "civil" label on a criminal law to avoid the protections that the Constitution requires in criminal proceedings. Since the purpose of the test is to limit legislative abuse of power, the focus of the test should be on the legislative branch and the law in question – on its face. Indeed, this Court has repeatedly held that the question of whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction.

The historic purpose of the double jeopardy clause is to protect persons from a second trial for the same offense. This purpose is given effect by a facial inquiry, not an "as applied" test. Under an "as applied" test, the double jeopardy determination would only be made after a person has been committed and is subject to confinement. At that point, the person already has suffered the very harm that the double jeopardy clause was designed to prevent.

The Court's facial test comports with the language of the *ex post facto* clause which speaks to the passage of a *law*. The Court's decisions interpreting the clause focus on this law-making function. By contrast, the Ninth Circuit's "as applied" test would depart from the law and look at the day-to-day conduct of the SCC which, if Young's allegations are correct, is contrary to the express requirements of the Statute. Thus, the Ninth Circuit's "as applied" analysis would not turn on retroactive application of the law, but on alleged administrative actions which, if true, violate the Statute.

4. The Ninth Circuit's "as applied" test also is inconsistent with separation of powers and is an unworkable approach. Under the Ninth Circuit's "as applied" test, an executive agency effectively may render punitive and thus, invalid, Washington's civil law, simply by failing to provide

the care and treatment that it specifically requires. The Ninth Circuit's approach must be rejected because the executive branch has no constitutional power to suspend laws adopted by the legislative branch. Indeed, the Constitution requires the executive to faithfully execute the law.

Further, the "as applied" test is unworkable in the context of confinement because it extends over a period of time under conditions that may change. If conditions of confinement are inadequate at some point, but later become adequate, it is unclear to which conditions an "as applied" test is to look. Such a test also fails to finally determine the civil or criminal nature of the Statute under the double jeopardy and *ex post facto* clauses. Under the Ninth Circuit's "as applied" approach, the constitutionality of the Washington Statute may vary from day to day and from person to person, depending on conditions of confinement.

5. Finally, the Ninth Circuit's conclusion that Washington's Statute may violate the double jeopardy and *ex post facto* clauses is in conflict with *Hendricks* for reasons in addition to its rejection of this Court's facial test. In *Hendricks*, the Court held that these two clauses do not even apply to the Kansas Act. The Court concluded that the double jeopardy clause does not apply because the Kansas Act did not make the commission of a specified offense the basis for invoking the commitment proceeding. The prior conviction was used only for evidentiary purposes to determine whether a person suffers from a mental abnormality or personality disorder and poses a threat to the public. The Court also concluded that the *ex post facto* clause did not apply because the Kansas Act did not have retroactive effect. Rather, commitment was predicated on demonstrating that a person currently suffers from a mental abnormality and is likely to be dangerous. These two holdings apply equally to Washington's Statute, which in all material respects is identical to the Kansas Act.

6. Although Young's claim of inadequate care and treatment does not implicate the civil character of Washington's Statute for double jeopardy or *ex post facto* purposes, Young nevertheless has a remedy available for his claim. There is no question that Young has a right to adequate care and treatment both under the Statute and the Constitution. However, Young's remedy is an action under 42 U.S.C. § 1983, challenging allegedly inadequate conditions, not a habeas proceeding challenging the validity of the Statute.

ARGUMENT

The sole matter before this Court is the Ninth Circuit's holding that Washington's civil commitment statute may be divested of its civil nature and converted to a criminal statute that violates double jeopardy and *ex post facto* prohibitions if Young demonstrates that his conditions of confinement are punitive. Thus, according to the Ninth Circuit, if DSHS, the agency charged with administering the Statute, fails to comply with its terms and instead engages in punitive conduct, the agency's unauthorized actions vitiate the civil nature of the Statute and render it invalid "as applied".

Under the Ninth Circuit's approach, it no longer would matter that the Legislature intended to adopt a civil statute and effectuated its intent by enacting a statutory scheme that is civil in its purpose and effect. Rather, administration of the Statute in a manner contrary to its requirements would result in invalidating the law "as applied" for purposes of the double jeopardy and *ex post facto* clauses. The Ninth Circuit's so called "as applied" test dramatically departs from this Court's double jeopardy and *ex post facto* jurisprudence. It conflicts directly with *Hudson* and *Hendricks* and finds no support in decisions of this Court applying the double jeopardy and *ex post facto* clauses. The appropriate remedy for the deficiencies alleged by Young is to be found in 42 U.S.C. § 1983. The Ninth Circuit's decision should be reversed.

A. The Sexually Violent Predators Statute, On Its Face, Satisfies The Double Jeopardy And *Ex Post Facto* Clauses

1. The Court Has Adopted A Two-Part Facial Test To Determine Whether A Law Is Civil Or Criminal Under The Double Jeopardy And *Ex Post Facto* Clauses

The double jeopardy and *ex post facto* clauses apply exclusively to criminal proceedings and punishments. The clauses do not apply to civil proceedings and remedies. *Hendricks*, 521 U.S. at 369.[8] The question of "whether a given sanction is civil or criminal is one of statutory construction". *One Lot Emerald Cut Stones And One Ring v. United States*, 409 U.S. 232, 237 (1972). The Court has developed a two-part test to determine whether a particular proceeding or sanction is civil or criminal. This test has been used to determine the "civil versus criminal" inquiry for both the double jeopardy and *ex post facto* clauses. *Hendricks*, 521 U.S. at 361.

Under the test, the Court asks "whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other". *Hudson*, 522 U.S. at 99 (internal punctuation omitted). If the Legislature has adopted the "civil" label, the Court inquires "further whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty". *Id.* (citations omitted) (internal punctuation omitted). In applying this test, the Court has held that the seven factors listed in *Kennedy v. Mendoza-*

[8] Justices Scalia and Thomas, however, have concluded that "the Double Jeopardy Clause prohibits successive prosecution, not successive punishment". *Hudson*, 522 U.S. at 106 (Scalia, J., concurring).

Martinez, 372 U.S. at 168-69, provide useful guideposts.[9] *Hudson*, 522 U.S. at 99. The Court has made it clear that these "factors must be considered *in relation to the statute on its face* and only the *clearest proof will suffice* to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty". *Id.* at 100 (emphasis added) (citations omitted) (internal punctuation omitted).[10] The Ninth Circuit, by adopting Young's "as applied" analysis, has deviated from this well-established precedent.

2. Washington's Statute, On Its Face, Is A Civil Law

It is not disputed that the Washington Statute, on its face, establishes a proceeding that is civil in purpose and effect. The Washington Supreme Court initially reached this conclusion in *In re Young*, 122 Wash. 2d 1, 857 P.2d, 989 (1993). Applying the two-part test, the Washington court concluded "that the sexually violent predator Statute is civil, not criminal, in nature. The language and history of the Statute so indicate, as do its purposes and effect." *Id.* at 23. As a general matter this Court has given considerable weight to the findings of lower state courts regarding the intent or purpose underlying a state's official actions. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995).

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[9] The seven *Kennedy v. Mendoza-Martinez* factors are "(1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment – retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned". *Hudson*, 522 U.S. at 493 (internal quotation marks omitted).

[10] Historically, in considering evidence of the "clearest proof", this Court has confined its inquiry to matters relating to the intent of the Legislature at the time of the law's enactment. *See, e.g., Cummings v. Missouri*, 4 Wall. 277, 320 (1866); *Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952); *Flemming v. Nestor*, 363 U.S. 603, 616-20 (1960).

More significantly, this Court upheld the Kansas sexually violent predator law under the two-part test, concluding that "the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive". *Hendricks*, 521 U.S. at 369. The Kansas Act upheld in *Hendricks* was modeled after Washington's Statute, and the laws are nearly identical in all relevant respects.

In this case, even the Ninth Circuit has recognized that Washington's Statute is civil on its face and thus comports with double jeopardy and *ex post facto* protections. *Young v. Weston*, 192 F.3d at 874 ("*Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses"). Young has not sought review of the Ninth Circuit's judgment on this point.

Thus, as in *Hendricks*, Washington's Sexually Violent Predators Statute does not violate the double jeopardy and *ex post facto* clauses because the Statute "does not establish criminal proceedings and . . . involuntary confinement pursuant to the Act is not punitive". *Hendricks*, 521 U.S. at 369.

B. *Hudson* Limits The Test Of Whether A Statute Is Civil Versus Criminal To The Face Of The Statute

This Court has long held that the purpose and effect test for determining whether a law is civil or criminal "must be considered in relation to the statute on its face". *Kennedy v. Mendoza-Martinez*, 372 U.S. at 169. Applying this principle should have resolved this case because the Ninth Circuit agrees that "*Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses". *Young v. Weston*, 192 F.3d at 874, Pet. App. at 7a. The Ninth Circuit seeks to avoid *Hendricks* by adopting an "as applied" test to determine whether a proceeding is civil or criminal for the purposes of the double

jeopardy and *ex post facto* clauses.[11] In *Hudson v. United States*, 522 U.S. 93 (1997), this Court rejected the "as applied" test in the context of the double jeopardy clause. *Hudson* held that the purpose and effect test "must be considered in relation to the statute on its face". *Hudson*, 522 U.S. at 100.

The Ninth Circuit's opinion effectively resurrects the "as applied" approach of *United States v. Halper*, 490 U.S. 435 (1989), disavowed in *Hudson*.[12] Departing from the longstanding principle that the civil or criminal character of a statute must be determined in relation to the statute on its face, *Halper* concluded that a violation of double jeopardy "can be identified only by assessing the character of the actual sanctions imposed on the individual". *Halper*, 490 U.S. at 447.

In *Hudson*, the Court rejected the "as applied" standard and "disavow[ed] the method of analysis used" in *Halper*. *Hudson*, 522 U.S. at 96. In doing so, the Court sought to resolve "the wide variety of novel double jeopardy claims spawned in the wake of *Halper*". *Id.* at 98. According to the *Hudson* Court, *Halper* "deviated from [the Court's] traditional double jeopardy doctrine . . . [by] asses[ing] the character of the actual sanction imposed, rather than, as *Kennedy* demanded, evaluating the statute on its face to determine

[11] The Ninth Circuit's decision fundamentally distorts the nature of an "as applied" challenge, permitting such a challenge to be brought when the bases for it are in direct conflict with the terms of the statute at issue. Washington's Statute unequivocally gives committed persons "the right to adequate care and individualized treatment". Wash. Rev. Code § 71.09.080(2), Pet. App. at 122a. In essence, Young contends that the SCC is not providing to him the very treatment that the Statute requires – i.e., that the SCC is not applying the Statute.

[12] However, unlike the case in *Halper*, where the challenged sanction was authorized by the act, the conduct complained of by Young is not even within the ambit of conduct authorized by the Statute. Indeed, it is directly contrary to its requirements. To treat such allegations as an "as applied" challenge is to ignore that the gravamen of Young's complaint is the conduct of state administrative officials, having no basis in the Statute that he purports to challenge "as applied".

whether it provided . . . a criminal sanction". *Id.* at 101 (citations omitted) (internal punctuation omitted). *Halper's* approach had proved "ill-considered" and "unworkable". *Id.* at 93. *Hudson* reaffirmed that the factors listed in *Kennedy v. Mendoza-Martinez* "provide useful guideposts" in determining the purpose and effect of a law. *Id.* at 99. The Court emphasized that "these factors must be considered in relation to the statute on its face". *Id.* at 100.

Although *Hudson* involved the double jeopardy clause, its reasoning is equally applicable to the *ex post facto* clause. In *Hendricks*, and a number of cases, the Court applied the same analysis to determine whether a law is civil or criminal in nature. *E.g.*, *Flemming v. Nestor*, 363 U.S. 603 (1960) (*ex post facto* clause); *United States v. Ward*, 448 U.S. 242 (1980) (Fifth Amendment). There is no reason to suppose a different civil versus criminal analysis should apply between the double jeopardy and *ex post facto* clauses.

C. There Is No Basis For Distinguishing This Case From *Hudson*

Hudson disavowed *Halper* and explicitly held that the civil versus criminal inquiry must be applied to the statute on its face. Logically, this conclusion also applies to the *ex post facto* clause. The Ninth Circuit ignores *Hudson*, except for a brief footnote which purports to distinguish this case because "*Hudson* involved monetary penalties and occupational disbarment [and] this case involves confinement". *Young v. Weston*, 192 F.3d at 874 n.4; Pet. App. at 7a n.4. This is a distinction without a difference.

Nothing in *Hudson* suggests that the requirement to consider the statue on its face is limited to monetary penalties and occupational disbarment, and does not apply to confinement. In fact, the Ninth Circuit's claim that confinement requires a different civil versus criminal analysis is contrary to *Hudson's* holding that one of the *Kennedy v. Mendoza-Martinez* factors should not be elevated above all others. One of the *Kennedy v. Mendoza-Martinez* factors

recited in *Hudson* is "whether the sanction involves an affirmative disability or restraint". *Hudson*, 522 U.S. at 99. Nevertheless, under the Ninth Circuit's holding, if such a restraint – confinement – is involved, a statute must be analyzed "as applied" instead of on its face.

Hudson disavowed the same kind of analysis. According to *Hudson*, the *Halper* Court erred by "elevat[ing] a single *Kennedy* factor . . . to dispositive status. But . . . no one factor should be considered controlling as they may often point in differing directions." *Hudson*, 522 U.S. at 101 (internal punctuation omitted). The Ninth Circuit's approach shares *Halper's* flaws, because it requires an entirely different double jeopardy analysis of the purpose and effect of a statute if confinement is involved.

The Ninth Circuit also did not explain why it would matter, under the Constitution, whether the law involved confinement or a monetary fine. Under *Hudson*, the exclusive focus of the civil versus criminal analysis is the action of the legislative branch. An improper criminal intent can be derived from the language of the statute or it can arise from the "purpose and effect" of the statute – the natural and necessary possibilities that flow from the Legislature's chosen statutory scheme. When the necessary result of the statute is punitive, there is a violation of the double jeopardy and *ex post facto* clauses. It does not matter whether the law involves a fine or confinement. The Constitution forbids either possibility. The Ninth Circuit's view that double jeopardy and *ex post facto* protections vary depending on the type of sanction is a drastic departure from the prophylactic nature of the double jeopardy and *ex post facto* prohibitions.

The Ninth Circuit also failed to explain why *Hudson* would not apply to a statute involving confinement. It simply asserted that, in "cases considering the question whether confinement is criminal or civil, the Supreme Court has always looked to the actual conditions of confinement". *Young v. Weston*, 192 F.3d at 874 n.4; Pet. App. at 7a n.4. The Ninth

Circuit cited three case, without explanation, to support this assertion. These decisions do not support the Ninth Circuit's position.

The Ninth Circuit cites first to *Kansas v. Hendricks*, 521 U.S. 346 (1997). *Young v. Weston*, 192 F.3d at 874 n.4; Pet. App. at 7a n4. *Hendricks* fails to support the Ninth Circuit's assertion. *Hendricks*' conclusion that the Kansas Act was civil for purposes of the double jeopardy and *ex post facto* clauses was based on the face of the law. Hendricks argued that the Kansas Act was punitive because it did not offer legitimate treatment. *Hendricks*, 521 U.S. at 365. Although the Court discussed the availability of treatment, it based its ruling on the language of the Act. According to the Court:

> "*Indeed, critical language in the Act itself* demonstrates that the Secretary of Social and Rehabilitation Services, under whose custody sexually violent predators are committed, *has an obligation to provide treatment to individuals like Hendricks. . . . Other of the Act's sections echo this obligation to provide treatment* for committed persons. . . . Thus, as in *Allen* [*v. Illinois*], the State has a statutory obligation to provide care and treatment for persons adjudged sexually dangerous designed to effect recovery . . . and we may therefore conclude that the State has . . . provided for the treatment of those it commits." *Hendricks*, 521 U.S. at 367 (emphasis added) (last ellipses in original) (internal punctuation omitted).

In summarizing its double jeopardy and *ex post facto* civil versus criminal analysis, the Court listed the factors that resulted in its decision, all of which are based on the statute on its face.

> "Where the State has 'disavowed any punitive intent'; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and

> afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent." *Hendricks*, 521 U.S. at 368-69.

Similarly, the dissent in *Hendricks*, while making reference to the conditions of Hendricks' confinement, based its ultimate conclusion on factors inherent on the face of the law. Concluding that the Kansas Act violated the *ex post facto* clause, Justice Breyer cited four factors suggestive of the Act's punitive intent. "First, the [Kansas] State Supreme Court . . . has held that treatment is not a significant objective of *the Act*." *Hendricks*, 521 U.S. at 383 (emphasis added). "Second, the *Kansas statute* insofar as it applies to previously convicted offenders, such as Hendricks, commits, confines, and treats those offenders after they have served virtually their entire criminal sentence." *Id.* at 385 (emphasis added). "Third, *the statute*, at least as of the time Kansas applied it to Hendricks, did not require the committing authority to consider the possibility of using less restrictive alternatives[.]" *Id.* at 387 (emphasis added). "Fourth, *the laws of other States* confirm, through comparison, that Kansas' 'civil commitment' objectives do not require the *statutory features* that indicate a punitive purpose." *Id.* at 388 (emphasis added).

Nor does *Allen v. Illinois*, 478 U.S. 364 (1986), support the Ninth Circuit's assertion. *Allen* concerned an Illinois law authorizing the civil commitment of sexually dangerous persons. The question before the Court was whether, for Fifth Amendment purposes, Illinois' statute was civil or criminal. As in *Hendricks*, the *Allen* Court focused on the statutory language rather than the actual daily conditions of confinement experienced by Allen. Although noting that it "might well be a

different case" if petitioners had shown conditions of confinement essentially identical to that of felons, the Court did not remand for additional evidence on the statute "as applied". *Allen*, 478 U.S. at 373. Instead, the Court looked again to the language of the statute, noting that "counsel for the State assures us that, *under Illinois law*, sexually dangerous persons must not be treated like ordinary prisoners". *Id.* at 374 (emphasis added).

Bell v. Wolfish, 441 U.S. 520 (1979), also does not support the distinction between confinement and other sanctions. In *Bell*, pretrial detainees brought a class action suit alleging that deficient conditions of confinement violated their rights to due process. The suit did not raise double jeopardy or *ex post facto* claims. While the Court focused on conditions of confinement, it did so in order to determine whether an injunction should issue to improve those conditions, not to determine whether the underlying law authorizing pretrial detention was civil or criminal. *Bell*, 441 U.S. at 523-30.

In summary, none of the cases cited by the Ninth Circuit support its assertion that cases involving confinement are an exception to *Hudson's* rule that a statute's civil or criminal character must be determined with reference to the statute on its face.

D. The Purposes Of The Double Jeopardy And *Ex Post Facto* Clauses Require Limiting Civil Versus Criminal Review To The Face Of The Statute

1. Civil Versus Criminal Review Is A Limitation On Legislative Power

This Court's civil versus criminal jurisprudence was developed as a limit on legislative power. Congress has broad power to adopt civil laws. Congress has less leeway to adopt criminal laws or laws imposing criminal punishment because such laws are subject to constitutional protections, such as those found in the double jeopardy and *ex post facto* clauses. The civil versus criminal test was developed to determine

whether a law is subject to these constitutional protections. *See generally United States v. Ward*, 448 U.S. at 248.

The civil versus criminal jurisprudence sets out a two part test – both parts of which are directed at the actions of the legislative branch. The first part of the test asks whether "Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other". *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984) (quoting *United States v. Ward*, 448 U.S. at 248). If Congress intends a "civil" label, the second part of the test inquires "whether the *statutory scheme* was so punitive either in purpose or effect as to negate that intention". *Id.* at 362-63 (emphasis added). In other words, even if Congress uses a "civil" label, the court will look at the "purpose or effect" of the "statutory scheme" to determine if it "is so unreasonable or excessive that it transform[s] what was clearly intended as a civil remedy into a criminal penalty". *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956). If the Court finds the purpose or effect of the law imposes a criminal penalty, the Court will apply double jeopardy and *ex post facto* protections despite the civil label.

Thus, the purpose of this Court's civil versus criminal test is to prevent the Legislature from putting a "civil" label on a criminal law to avoid the criminal protections in the Constitution. Since the purpose of the test is to limit legislative abuse of power, the focus of the test should be on the legislative branch and the law in question – on its face. Indeed, this Court has repeatedly held that "the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction". *United States v. Ward*, 448 U.S. at 248; *One Lot Emerald Cut Stones*, 409 U.S. at 237; *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938); *Allen*, 478 U.S. at 368; *Hendricks*, 521 U.S. at 361; *Hudson*, 522 U.S. at 99.

2. Double Jeopardy Is Historically A Pre-Trial Plea

The Ninth Circuit's "as applied" test is inconsistent with the historic purpose of double jeopardy as a pre-trial plea. As its history indicates, double jeopardy is a "paradigmatically pretrial plea". Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807, 1817 (1997). "The common law not only prohibited a second punishment for the same offence, but it went further and [forbade] a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted." *Ex parte Lange*, 18 Wall. 163, 169 (1873): "Because of this focus on the 'risk' of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction." *Abney v. United States*, 431 U.S. 651, 661 (1977).

Under the Ninth Circuit's "as applied" test, however, the court must look at the actual conditions under which a respondent is confined following commitment as a sexually violent predator to determine whether the double jeopardy clause is implicated. Thus, the double jeopardy determination is made only after the respondent has been subjected to the very harm from which the double jeopardy clause provides protection. But as this Court pointed out in *Hudson*, this approach "flies in the face of the notion that the Double Jeopardy Clause forbids the government from even 'attempting a second time to punish criminally'". *Hudson*, 522 U.S. at 102 (citing *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)).

3. The *Ex Post Facto* Clause Requires A Focus On Law, Not Activity

The *ex post facto* clause provides that "[n]o State shall . . . pass any . . . ex post facto Law". U.S. Const. art. I, § 10. The purpose of the *ex post facto* clause is to "restrict[] government[al] power by restraining arbitrary and potentially vindictive legislation". *Weaver v. Graham*, 450 U.S. 24, 29 (1981). Like the double jeopardy clause, the *ex post facto* clause applies "only to certain types of criminal laws". *Carmell v. Texas*, 120 S. Ct. 1620, 1627 (2000). The focus of the *ex post facto* clause is on enactment of laws by the state or federal government.

In *Carmell*, this Court adhered to its view that the *ex post facto* clause applies to four categories of laws. *Carmell*, 120 S. Ct. at 1627. (e.g., "1st. *Every law* that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action."). Each of the four categories, like the *ex post facto* clause itself, speaks in terms of a law. Thus, the focus of the *ex post facto* clause is the action of the legislative branch.

The Ninth Circuit's "as applied" test departs from this focus on the passage of law and asks this Court to examine the actual day-to-day implementation of the Statute by an administrative agency. Moreover, the day-to-day implementation that forms the basis of Young's complaint is contrary to the requirements of the Statute. Young claims he is not receiving proper care and treatment. Yet the Statute explicitly requires "adequate care and individualized treatment". Wash. Rev. Code § 71.09.080(2), Pet. App. at 122a. Thus, the Ninth Circuit's "as applied" analysis does not turn on retroactive application of the Statute, but on alleged administrative actions which, if true, violate the Statute.

E. The "As Applied" Test Is Inconsistent With The Constitutional Power Of The Executive Branch

Since the seminal case of *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), it has been incumbent on the executive branch and its agencies to faithfully execute all laws. The *Kendall* Court rejected the notion that the authority to faithfully execute the law includes the power to suspend execution of certain laws:

> "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Id.* at 613.

In fact, the framers of the Constitution clearly intended to deny the President a "suspending" or "dispensing" power beyond the qualified veto procedure specifically described in Article I, Section 7, Clause 2 and subject to an override by Congress. *See generally* Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865, 873-96 (1994). By the time of our Constitution, even English kings no longer enjoyed this broad prerogative to avoid execution of laws. *Id.* at 869-72. Thus, it is clear that the executive and agencies of the executive have a duty to execute all laws.

The Ninth Circuit's "as applied" test is inconsistent with the executive's duty to faithfully execute the law and with the legislature's power to make the law.[13] In this case, the

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[13] As with the President, the Washington Constitution requires the Governor to "see that all laws are faithfully executed". Wash. Const. art. III, § 5. And, as with Congress, the Washington Constitution vests the legislative power of the state in the Legislature. Wash. Const. art. I, § 1.

Washington Legislature enacted a commitment statute that, on its face, is civil in purpose and effect. The Statute specifically requires adequate care and individualized treatment, and protects the civil rights of persons committed under its terms. The gravamen of Young's complaint in this case is that the executive branch is failing to comply with these requirements of the Statute.

The Ninth Circuit's "as applied" test assumes that, by failing to comply with statutory requirements, the executive effectively may suspend the law because, according to the Court of Appeals, "[a]ctual conditions of confinement may divest a facially valid statute of its 'civil' label[.]" *Young v. Weston*, 192 F.3d at 874, Pet. App. at 7a-8a. If the Ninth Circuit is correct that an executive agency's alleged failure to comply with a statute may vitiate the legislature's adoption of a civil law and thus, render the law invalid, then the executive effectively is empowered to suspend a legislative enactment.

The drastic and untoward effect that the Ninth Circuit's approach would have on the balance of power between the legislative and executive branches of government is reason enough to demonstrate its error and to reject it. In addition, *Kendall* demonstrates its error. *Kendall* stands for the proposition that such a result is not countenanced in the law and that an executive can be compelled in mandamus to comply with the terms of a statute. *Kendall*, 37 U.S. at 624-25. This also is true in Washington. Under Washington law, Wash. Rev. Code § 71.09.080(2), the alleged failure of the SCC to provide adequate care and treatment would be subject to issuance of a writ of mandamus. Wash. Rev. Code § 7.16.160. Although the method for providing adequate care and treatment is discretionary, the decision whether to comply with this provision is not. In addition, the treatment requirement may be enforced in an action under 42 U.S.C. § 1983. *See infra* pp. 31-32.

There is no merit to the Ninth Circuit's approach. Duly enacted statutes must be reviewed for compliance with constitutional requirements as enacted, not on the basis of alleged administrative actions of an executive agency that are contrary to the law. By limiting civil versus criminal analysis to the face of the Statute, in accord with *Hudson*, the Court avoids the unsound and unwise consequences of the Ninth Circuit's "as applied" approach.

F. The "As Applied" Test Is Unworkable

The Ninth Circuit essentially retreats to *Halper*. *Hudson* disavowed *Halper's* analysis because it "deviated from our traditional double jeopardy doctrine" and because the "as applied" test "has prove[n] unworkable". *Hudson*, 522 U.S. at 101, 93. Like *Halper*, the Ninth Circuit's test deviates from the Court's traditional approach of determining whether a statute is civil or criminal on the basis of the statute itself. And, like *Halper*, the Ninth Circuit's approach is unworkable, although for different reasons.

In *Halper*, the Court performed an "as applied" analysis with respect to a statutorily prescribed monetary charge. Because the penalty was fixed and was imposed only once, rather than on an ongoing basis, precisely how the monetary charge "applied" to Halper was clear and would remain constant. Neither of these predicates for a *Halper*-type "as applied" analysis exists where, as in this case, the focus of the "as applied" challenge is confinement that extends over time, under conditions that may change. The difficulty this presents for an "as applied" challenge can be demonstrated by two examples. Suppose that conditions of confinement at the SCC presently are adequate but that they were punitive at some point earlier in Young's commitment. Or suppose that the conditions were adequate initially, became punitive for a short period and subsequently, were remedied. To what would a

court direct an "as applied" inquiry – to the previously punitive confinement or to the current permissible confinement? Unlike the case in *Halper*, where the focus of the Court's "as applied" analysis was a statutorily fixed one-time sanction, the answer to this question is far from clear.

Perhaps, more fundamentally, the Ninth Circuit's "as applied" approach is unworkable because it will not finally resolve the question of whether Washington's Statute is civil or criminal and, thus, will not finally determine its validity under the double jeopardy and *ex post facto* clauses. Rather, under the Ninth Circuit's "as applied" approach, the validity of the Statute can vary from day to day, and from one committed individual to another, depending on the nature of the care and treatment that is provided at a particular time or to a particular person. The Court should not retreat to such an unworkable "as applied" test.

G. The Sexually Violent Predator Statute Also Withstands Challenge Under The Double Jeopardy And *Ex Post Facto* Clauses Because It Does Not Involve The Same Offense Or Operate Retroactively

In *Hendricks*, the Court rejected the argument that the Kansas Act violates double jeopardy, because it fails the same elements test of *Blockburger v. United States*, 248 U.S. 299 (1932). The Court rejected the argument, because the Kansas Act does not make "the commission of a specified 'offense' the basis for invoking the commitment proceedings". *Hendricks*, 521 U.S. at 370. Rather, the Court concluded that the Act "*uses a prior conviction* (or previously charged conduct) *for evidentiary purposes* to determine whether a person suffers from a 'mental abnormality' or 'personality disorder' and also poses a threat to the public". *Id.* (emphasis added).

This conclusion applies equally to Washington's Statute as it is identical to the Kansas Act on this point . The Kansas Act, in *Hendricks*, defined a "sexually violent predator" as "*any person who has been convicted of or charged with a sexually violent offense* and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence. § 59-29a02(a)." *Hendricks*, 521 U.S. at 352 (emphasis added). Wash. Rev. Code § 71.09.020 (1990) provides that "sexually violent predator" means "*any person who has been convicted of or charged with a crime of sexual violence* and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence". Wash. Rev. Code § 71.09.020(1) (1990), Pet. App. at 104a (emphasis added).

Hendricks also concluded that the Kansas Act did not violate the *ex post facto* clause because it "*clearly does not have retroactive effect*". *Hendricks*, 521 U.S. at 371 (emphasis added). The same is true of Washington's Statute. Both laws are based on "a determination that the person *currently* both suffers from a 'mental abnormality' or 'personality disorder' and is likely to pose a future danger to the public". *Id.* (emphasis added). Thus, past behavior is taken into account "*solely for evidentiary purposes*". *Id.* (emphasis added).

For these additional reasons, Washington's Statute does not violate the double jeopardy or *ex post facto* clauses.

H. The Remedy For Inadequate Treatment And Conditions Is An Action Under 42 U.S.C. § 1983

Hendricks and *Hudson* establish that the court looks at the face of the law in determining whether it is civil or criminal

for purposes of the double jeopardy and *ex post facto* clauses. The actual conditions of confinement or adequacy of treatment are irrelevant to this inquiry. This does not mean that Young is without a remedy to cure inadequate treatment or conditions. It only means that the remedy is not found in the double jeopardy and *ex post facto* clauses. As *Hudson* explained, "some of the ills at which *Halper* was directed are addressed by other constitutional provisions". *Hudson*, 522 U.S. at 102-03.

In this case, Young's remedy is not a release pursuant to a writ of *habeas corpus* under 28 U.S.C. § 2254(1).[14] Instead it is an action under 42 U.S.C. § 1983. Young has a right to adequate treatment and conditions under both the Statute and the due process clause of the Constitution. *See Youngberg v. Romeo*, 457 U.S. 307 (1982).

A § 1983 action is currently pending regarding the adequacy of treatment at the SCC for the benefit of Young and others confined there. *Turay v. Seling*, No. C91-664WD (W.D. Wash.), *see supra* pp. 8-9. This is the proper way to address treatment and confinement issues.

[14] Even if the Court were to return to the "as applied" test of *Halper* when confinement is at issue, Young would not be entitled to release under a writ of habeas corpus. In *Halper*, the Court did not void the underlying civil liability. Instead, the Court remanded the case so the government could establish the appropriate non-punitive level of the fine. *Halper*, 490 U.S. at 452. The teaching of *Halper* is that the remedy under an "as applied" test is to eliminate the punitive part of the sanction while permitting the civil part of the sanction to be imposed. In this case, that would mean correcting conditions that render the "as applied" Statute punitive. There is no reason that the result should be any different under an *ex post facto* analysis, where the goal of preventing the retroactive application of punishment can be achieved by improving conditions to eliminate the imposition of "punishment". And this result is effected through a § 1983 action.

CONCLUSION

The Ninth Circuit reversed the decision of the district court in part and remanded for an evidentiary hearing. For the reasons stated herein, this portion of the Court of Appeals decision should be reversed and the respondent's Petition For Writ Of Habeas Corpus should be dismissed.

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IN THE

Supreme Court of the United States

MARK SELING,
Superintendent, Special Commitment Center,
Petitioner,

v.

ANDRE BRIGHAM YOUNG,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE RESPONDENT

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QUESTIONS PRESENTED

The Ninth Circuit remanded this case to the Federal District Court for an evidentiary hearing on whether the conditions of confinement rendered the Washington sexually violent predator statute punitive as applied to Mr. Young. The questions presented by this case are as follows:

Whether a court may find that the application of a "predator" civil commitment law violates double jeopardy, ex post facto, or due process protections, upon clearest proof that the law has been implemented in a pervasively punitive manner throughout its entire nine-year history.

Whether *Hudson v. United States* overturns more than 100 years of precedent reviewing the manner in which statutes are applied as a means of testing their constitutionality, in matters involving deprivations of personal liberty.

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STATEMENT OF THE CASE

This case comes before the Court on Certiorari from a decision of the Ninth Circuit Court of Appeals granting an evidentiary hearing in a habeas corpus challenge to incarceration under Washington's "Sexually Violent Predator" statute, Wash. Rev. Code 71.09.

(a) Proceedings in This Case

(i) State Court

Andre B. Young completed his sentence for a 1986 rape conviction in October, 1990. He had committed no new crime nor any recent overt act which would indicate either a mental disorder or dangerousness. Yet on the day he was to be released from prison, he was arrested on an *ex parte,* no-bail warrant and transferred to a different, maximum security prison. JA 26, ER 3.[1] He has been incarcerated ever since.

The State's petition alleged that Mr. Young suffered from a mental abnormality or personality disorder making him likely to re-offend in a sexually violent manner. JA-19.

Mr. Young was not permitted to challenge the conditions of confinement at the Special Commitment Center. (See Motion to Reconsider in State Supreme Court, JA 33 *et. seq.)* The jury did not consider less restrictive alternatives to confinement. The jury was required to find as an element of the "predator" petition that Mr. Young had been convicted of rape. JA-29 The jury returned a verdict finding Mr. Young a "sexually violent predator." The judge signed an order confining Mr. Young to the Special Commitment Center ("SCC"). SCC is located in a maximum security prison. It is run by the Department of Social and Health Services pursuant

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[1] The judge who signed the warrant interlineated the phrase "with no bail pending appearance before the court." ER 3. [ER refers to the Excerpt of Record filed in the Ninth Circuit Court of Appeals.] Mr. Young was not permitted to appear in court for nearly four months.

to a contract with the Department of Corrections (DOC). JA-30, JA-50. Mr. Young's commitment remains in effect until he is deemed to be "safe to be at large." JA-30.

Mr. Young appealed. In 1993, the state supreme court upheld his commitment, even while finding portions of the Statute unconstitutional under the Equal Protection clause. It found harmless a number of procedural and evidentiary errors, but ordered changes in the Statute on the basis of its "inherent judicial power," and ordered a new trial solely on the issue of less restrictive alternatives. *In re Young*, 122 Wn.2d 1 (1993), 857 P.2d 989. In 1994, a jury found that less restrictive alternatives were not appropriate.

(ii) Federal Court

Mr. Young filed a habeas corpus petition in 1994 alleging that his incarceration under the Statute was unconstitutional. JA-69. The Federal District Court granted the petition in 1995, finding that the statute violated due process, double jeopardy, and ex post facto protections. JA-91. The State appealed. While the appeal was pending in the Ninth Circuit, this Court accepted certiorari in *Kansas v Hendricks*, 521 U.S. 346 (1997). The Court of Appeals stayed Mr. Young's case, and, following the decision in *Hendricks*, remanded the case to the District Court. *Young v. Weston*, 122 F.3d 38 (9th Cir. 1997). The District Court, relying on *Hendricks*, reversed its earlier order. The Court did not address Mr. Young's request for an evidentiary hearing. Appendix to Petition for Certiorari (hereinafter Pet . App.), 15a; JA 92.

Mr. Young appealed. The Court of Appeals ruled that if he were able to prove that the conditions in the SCC were punitive as he had alleged, his commitment should be set aside as a violation of the double jeopardy and ex post facto clauses. App. Pet. 8a. The Court remanded the case to District Court for an evidentiary hearing. *Id.*, 13a. This Court granted the state's petition for certiorari. JA-152.

(b) Conditions of Confinement

The SCC always has been located within a prison. For its first eight years, the SCC was located within a maximum security prison in Monroe, Washington. In 1998, it was moved to McNeil Island Correctional Center (MICC), a prison on an island in Puget Sound. JA-128.

Washington denies persons committed under Wash. Rev. Code 71.09 the same status as other civilly committed persons. Wash.Rev.Code 71.09 precludes placing any 71.09 detainee "on the grounds of any state mental facility or regional habilitation center. "Wash. Rev. Code 71.09.060 (3). The Legislature authorized the placement of SCC in a prison. Wash. Rev. Code 71.09.060(3), 10.77.220. Pet. App. 108a, 121a.

The SCC depends upon the DOC for internal and external security, medical care, food services, visiting rooms, and library. JA-79. SCC detainees have fewer privileges and opportunities than do DOC prisoners for employment, structured leisure activities, education, law library access, visiting, and recreation. JA-54, 55, 87.

In 1992, an expert evaluator commissioned by the State found that the SCC employed "excessive physical security and rule related security" and "inconsistent application of disciplinary rules . . . " The evaluator described the absence of a less restrictive alternative community transition program as a "fatal problem". Washington Institute for Public Policy, *Review of Sexual Predator Program: Community Protection Research Project*, (Quinsey, V., 1992) at 5, ER 27. JA-83. Detainees are shackled and hand-cuffed any time they leave the facility, even though they are under constant armed guard. They are chained when they are transported to court. JA-8l.

(i) State court litigation

In 1994, a state trial court judge held that the conditions of confinement at the SCC violated substantive due process.

Detention of Campbell, King Co. No. 93-2-15348-1, JA-78.[2] The court based its conclusions on the lack of grievance procedures for inmate conduct violations, the use of a classification system which reflected neither security considerations nor treatment considerations, and lack of a comprehensive treatment program. The court found a "[l]ack of training and supervision of staff, resulting in verbal abuse of residents, a lack of trust and rapport between residents and staff, and a milieu counterproductive to treatment." JA-90. The Court found (JA-88):

> SCC staff have verbally abused residents, making derisive comments about residents' status or race . . . Staff have laughed during strip searches of residents . . . . Staff have requested a resident to harm other staff and have provided pornography to residents.

Verbal abuse of residents by SCC staff included use of epithets like "rapo," "pervert," "fucking punk," "niggers", "nigger lawyer," "sand niggers," and "sand monkeys." JA-59.

(ii) *Turay v.* Seling/*Sharp v. Weston/Seling*

In 1994, in a lawsuit filed by one of Mr. Young's fellow SCC detainees, a federal court jury found that the SCC had failed to provide treatment to residents. *Turay v. Weston,* (now entitled *Turay v. Seling*), No. C91-664WD, U.S. District Court for Western District of Washington. JA-64. The judge enjoined SCC administrators to provide constitutionally adequate treatment. Following SCC's initial failure to comply, the court appointed a Special Master.

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[2] The judge nonetheless denied Mr. Campbell's motion for release. See, *Detention of Campbell*, 139 Wn.2d 341, 345-6, 986 P2d 771, 773-775 (1999), petition for certiorari pending. The Washington Supreme Court upheld the order denying release. *Id.*, at 350.

More than four years later, in November, 1999, the court found the state in contempt for its continued failure to comply. See Order, Lodging of Petitioner-2.

The Special Master's reports and the Court's findings during the intervening years reflected the State's ongoing failure to provide constitutionally adequate treatment.

In 1997, the clinical director of the SCC admitted that conditions were "certainly more restrictive than a state hospital," and acknowledged an "ambience of incarceration." Seling Deposition ER 25 at 127-28. DOC staff performed daily "walk-throughs" of SCC. ER 25 Smith Deposition, App. B; 9/2/97 at 92-96; Seling Deposition, App. C, 9/3/97 at 133-35.

The SCC ombudsman, describing SCC's response to an incident in October, 1997, noted (ER 25):

> The punitive sanctions involved are unreasonable under these circumstances, and have no therapeutic purpose. The continued lockdowns, and extension of lockdown sanctions by therapy team staff, expose a counter-productive intention to exert physical and mental control over the residents not rationally related to this incident.

When the Monroe facility became over-crowded, SCC residents were simply housed in the prison within which SCC was located. ER 25, Seling Deposition at 42-43; Smith Deposition at 21. Such placements, the Special Master wrote,

> are clearly inappropriate for individuals in a mental health treatment program. This situation, along with the increased "walk-throughs" by DOC officers that began in June, demonstrates that SCC has not succeeded in insulating its program from the prison that surrounds it.

ER 25, Twelfth Report (9/17/97) at 8, emphasis added.

The district court in November, 1998, found that "The intertwining of MICC [McNeil Island Correctional Center] and SCC results in prison-like conditions and restrictions for SCC residents that have no therapeutic or security-based justification." JA-132. The court ordered SCC to take specific action to "reduce the negative effects" of SCC's dependence on the host prison. JA 136. A month later, Judge Dwyer adopted the conclusions of one expert witness (JA-147):

> . . . the Department of Corrections very clearly dominates physically, administratively, procedurally and psychologically the MICC and really in many significant ways encompasses the SCC. It is, for all intents and purposes, a prison. Feels like a prison, looks like a prison, and for the most part operates like a prison . . . SCC residents actually have fewer, not more, liberties in comparison to the Department of Corrections prisoners. . .

Treatment inadequacies continued as well. There was no clinical director for more than 15 months after the injunction order in 1994. JA-125. In November, 1998, there was "still no coherent and individualized treatment plan for each resident" despite the court's explicit direction (JA-131); staff were inadequately trained (JA-131), and there was a persistent failure to put into practice the plans which were presented to the court over the years. The Special Master remarked:

> The problem is that hardly any of the listed components have been developed . . . Similarly, no measures have been proposed for determining whether residents have achieved the many goals associated with each phase of the program. The document, then, while it is an excellent and ambitious plan, is essentially that—a plan for the institution's future. Unfortunately, it is not the program in place now. . .

Twelfth Report, ER 25, pp. 5-6.

Additional plaintiffs brought an action which was consolidated with *Turay*, and the state settled the damages claim in 1998. *Sharp v. Weston/Seling*, JA-119.

In 1998, court-appointed Resident Advocate, Stanley Greenberg, Ph. D., wrote (ER 25, App. A.):

> Because the SCC hasn't fundamentally changed over so many years, even with a court injunction, I have come to suspect that it is designed and managed, either overtly or covertly, to punish and confine these men and woman to a life sentence without any hope of release to a less restrictive setting.

In November, 1999, the court found the state in contempt for its continued failure to comply with the injunction, and threatened monetary sanctions should the state fail to achieve substantial compliance within six months. Lodging of Petitioner-2. On May 5, 2000, the court, noting improvement, held the monetary sanctions in abeyance, but concluded:

> the defendants have failed to make constitutionally adequate mental health treatment available to the SCC residents, and have departed so substantially from professional minimum standards as to demonstrate that their decisions and practices were not and are not based on their professional judgment.

Order, Lodging of Petitioner-17. The Court found that SCC still lacks "a systematic transition program with adequate LRA facilities", an aspect of treatment which has been "confirmed by all experts on both sides as a vital part of the professional minimum standards." *Id.*, at 13, 12.

The Court further found that "negative effects" of the DOC on SCC "continue to exist in some respects, and must be further reduced". The Court noted that while progress had been made because of the contempt order, "Shortfalls continue to exist in every area as the result of earlier failures to take the necessary steps. . . ." Lodging of Petitioner-10, 14, 16.

Prior to Judge Dwyer's contempt order, the Legislature had taken no action to improve conditions at SCC.

(c) Testimony About Mr. Young's Mental Condition

The state's evidence of Mr. Young's mental condition consisted of the testimony of one psychologist, Irwin Dreiblatt, who said it was his "diagnostic impression" [3] that Mr. Young suffered from a mental abnormality—a "paraphilia not otherwise specified", rape—, and a "personality disorder not otherwise specified", neither of which standing alone would support a conclusion that Mr. Young would be dangerous. By combining the two, however, he would say that Mr. Young was more likely than not to commit an unspecified crime of sexual violence in the indefinite future. Dr. Dreiblatt stated that he cannot predict whether a particular individual will reoffend within any particular time frame. ER 9, pp. 56, 160-3, 165-66. ER 10, p. 164. Dr. Dreiblatt relied in great part on Mr. Young's criminal convictions in reaching his conclusions.[4]

Dr. Dreiblatt acknowledged that "mental abnormality" is not a recognized psychological term, and that he, and each mental health professional called upon to apply it, needed to establish a "working definition." He acknowledged that the validity of classifying rape as a paraphilia is debated by experts in the field. ER 9, pp. 162,135; ER 10, pp.30, 111-112. Rape was not listed as a paraphilia in the third edition of the Diagnostic and Statistical Manual of Mental Disorders, American Psychiatric Association (3d Rev. Ed. 1987) ("DSM III-R"), nor is it included in the DSM-IV (4th ed . 1994).

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[3] Dr. Dreiblatt expressed his conclusions as a "diagnostic impression" —as opposed to an actual diagnosis—based on a review of Mr. Young's records. ER 10, pp.35-6; ER 11, pp.41-2. Dr. Wise, a defense expert, explained that a "diagnostic impression" is just an educated guess. ER 14, pp. 146-7.

[4] Dr. Dreiblatt testified that he "felt there was a severe paraphilia" based "on the number of times that he acted and committed rapes." ER 10, 58. Mr. Young had four convictions from 1963, one in 1976, and one in 1986.

Mr. Young presented the testimony of four expert witnesses. Dr. Nancy Steele, a psychologist and expert in the treatment of incarcerated sex offenders, testified that the term "mental abnormality", as defined in the statute, could not be applied in "any consistent, fair, rational way by the psychiatric or psychological community." ER 13 pp. 77-81, 110-113. Dr. Christian Harris, a psychiatrist with extensive experience in forensic issues, stated that "[r]ape is a behavior . . . not a diagnostic category. " ER 15, pp . 90-98, 101-02. Dr. Barbara Schwartz, a psychologist and director of the state prison sex-offender treatment program, explained that rape should not be classified as a "paraphilia, not otherwise specified" because the scientific community has repeatedly rejected this proposed category. ER 12, pp. 5-8, 19, 28-29.[5]

Dr. Harris and Dr. Fred Wise[6] testified that predictions based on personality disorders do not withstand scientific scrutiny. ER 14, p. 168 ; ER 15, pp. 101, 108-09, 112.

Dr. Steele testified that ethical guidelines of the American Psychological Association obligate a psychologist to be exceedingly cautious in making a prediction of criminal behavior that will be used to imprison or release someone, and to limit that prediction by clearly specifying the acts being predicted, the time in which those acts will occur, and the factors upon which the prediction is based. ER 13, pp. 165-68.

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[5] While Dr. Steele believed that rape could be a paraphilia, she recognized the controversy surrounding that classification and declined to identify it as a cause of sexually criminal behavior. ER 13, pp. 148-9.

[6] Dr. Wise, a licensed clinical psychologist and a neuropsychologist, has been the department head for civil commitments at Harborview Medical Center and University Hospital since 1983. He evaluates detained persons and testifies for the state in civil commitment proceedings under the involuntary treatment act, Wash. Rev. Code 71.05. ER 14, pp. 133-40.

SUMMARY OF ARGUMENT

By remanding the case for a hearing on whether Mr. Young's conditions of confinement are punitive, the Court of Appeals correctly applied the "clearest proof" requirement to the assertion that the statute is punitive in effect.

When the legislature has indicated an intention to establish a civil penalty, this Court has inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. *Flemming v. Nestor*, 363 U. S. 603, 617-621 (1960). The state argues that a court cannot look beyond the language of a statute to its actual operation in determining double jeopardy and ex post facto violations. It contends that the state's failure to provide constitutionally and statutorily required treatment and conditions of confinement is irrelevant to a habeas corpus challenge. The state's position contradicts a long history of case law in this Court, which as recently as in *Garner v. Jones*, 146 L.Ed 2d 236 (2000) , has made clear that proof of the actual operation of a statute is relevant to ex post facto, double jeopardy, and due process analysis.

Hudson v. United States, 522 U.S. 93 (1997), does not apply to commitment or incarceration. The state's reliance on *Hudson* is misplaced. In cases dealing with deprivation of personal liberty, such as *Kansas v. Hendricks, supra,* and *Garner v. Jones, supra,* this Court considers the conditions of confinement under the statute as applied.

Despite obvious similarities, the Washington statute differs from the Kansas statute upheld in *Hendricks* in ways that invalidate Mr. Young's commitment and violate the due process, double jeopardy, and ex post facto clauses.

The fact that Mr. Young has been held in punitive conditions for nearly ten years is evidence of the punitive purpose and effect of the statute, and demonstrates that the treatment goal of the statute is a sham. The evidence in Mr.

Young's case demonstrates that "mental abnormality" as used in Washington is so vague as to violate due process, and further, that Mr. Young's alleged abnormality and personality disorder are constitutionally insufficient to support commitment.

Mr. Young has a right to habeas relief from unconstitutional incarceration.

The implementation of the Washington law makes clear that both of Justice Kennedy's concerns in *Hendricks* are real in Washington—treatment under the law is a sham, and the term "mental abnormality" as it is used in Washington is so vague and imprecise as to violate due process and to make the "predator" law a substitute for criminal sentencing.

In *Hudson*, this Court wrote: "Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction." 522 U.S. at 99. But no punishment is permissible under a civil commitment statute. If the state is using a commitment statute to punish a person, and the statute by its terms requires for its application a prior conviction, then the statute is unconstitutional as a violation of due process, double jeopardy, and ex post facto protections.

ARGUMENT

(1) This Court has consistently considered the administrative application of statutes in determining whether such statutes are punitive under the Double Jeopardy, Ex Post Facto, Due Process, and Bill of Attainder Clauses.

The State claims that under *Hudson*, Mr. Young's conditions of confinement are irrelevant to the case at hand, and that Mr. Young is barred from an "as applied" challenge to the statute no matter how punitive conditions at the Special Commitment Center might be. Pet. Br. 29. But in *Kansas v. Hendricks*, decided a few months before *Hudson*, this Court

upheld a similar statute only after a careful analysis of the conditions of confinement at the Kansas "predator" facility:

> The conditions surrounding that confinement do not suggest a punitive purpose on the State's part. The State has represented that an individual confined under the Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institution. Because none of the parties argues that people institutionalized under the Kansas general civil commitment statute are subject to punitive conditions, even though they may be involuntarily confined, it is difficult to conclude that persons confined under this Act are being 'punished.'

521 U.S. at 363.[7]

The state makes much of *Hudson's* disapproval of *United States v. Halper*, 490 U.S. 435 (1989), which reviewed the character of the sanction actually imposed. Pet. Br.18. But a true civil commitment cannot be a sanction or a penalty. *Hudson* on its facts addressed the imposition of civil penalties such as forfeiture or debarment decisions made by a banking agency. *Hudson* does not apply.

Since *Hudson*, this Court has continued to rely upon both legislative history and administrative application in determining whether statutes are unconstitutionally punitive. In *Garner, supra*, the Court denied and remanded an Ex Post Facto challenge *because* the lower court had failed to consider the actual application of the statute by an administrative agency, instead looking only at the possible results flowing from the statutory language:

[7] The state incorrectly claims that the *Hendricks* dissent "based its ultimate conclusion on factors inherent on the face of the law." Pet. Br. 22. Justice Breyer noted for the dissent that there was much evidence to support the conclusion that there was a lack of treatment in Kansas, 521 U.S. at 384.

> When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.

U.S. at, 146 L.Ed. 2d 236, 247.[8] The Court explained:

> At a minimum, policy statements, along with the Board's actual practices, provide important instruction as to how the Board interprets its enabling statute and regulations, and therefore whether, as a matter of fact, the amendment to Rule 475-3-.05(2) created a significant risk of increased punishment. . . . The Court of Appeals was incorrect to say the Board's policies were of no relevance in this case.

Id. at 248. The Court concluded: "In the case before us, respondent must show that as applied to his own sentence the law created a significant risk of increasing his punishment." *Garner v. Jones*, 146 L.Ed 2d 236, 247.

The Ninth Circuit herein did exactly what *Garner* requires: remand the case for factual findings regarding the Statute as applied.

Garner is consistent with a long line of cases reviewing the application of statutes challenged as unconstitutionally punitive. In *Schall v. Martin*, 467 U.S. 253 (1984), for example, while finding that a juvenile pre-trial detention statute was not intended as punishment, the Court found it necessary to consider the conditions under which the juveniles were confined:

[8] The Courts use the same analysis of "punishment" for Ex Post Facto, Due Process, and Double Jeopardy purposes. For example, the Court in *Hudson*, a Double Jeopardy case, relied on the seven indicia of punishment listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), a Due Process case.

> Of course, the mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment. It is axiomatic that "[d]ue process requires that a pretrial detainee not be punished. [cite omitted] Even given, therefore, that pretrial detention may serve legitimate regulatory purposes, it is still necessary to determine whether the terms and conditions of confinement under ss 320.5(3)(b) are in fact compatible with these purposes.

467 U.S. at 269, citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *Schall* mandates an "as applied" review when challenges to incarceration are involved:

> It may be, of course, that in some circumstances detention of a juvenile would not pass constitutional muster. But the validity of those detentions must be determined on a case-by case basis.

467 U.S. at 273. The Court concluded that pretrial detention of juveniles *in the particular case at hand* was non-punitive because "[t]he conditions of confinement . . . appear to reflect the regulatory purposes relied upon by the State." Id. at 270.

Similarly, in *Reno v. Flores*, 507 U.S. 292 (1993), the Court first rejected a facial challenge to a statute permitting detention of juvenile illegal aliens, then rejected an "as applied" challenge only upon satisfying itself that the detention featured decent and humane conditions and an absence of "shackles, chains, or barred cells." Id. at 16-17.

In *Minnesota ex rel Pearson v. Probate Court*, 309 U.S. 270, 276-77 (1940), the Court upheld the validity of a commitment statute, but warned of the special need for caution in commitment cases, where the law though "fair on its face and impartial in appearance" may be open to serious abuses in administration.

In *Sas v. Maryland*, 334 F.2d 506, 516—517 (4th Cir. 1964)[9], the Fourth Circuit relied on *Pearson* in its discussion of a "defective delinquent" commitment statute:

> . . . . Deficiencies in staff, facilities, and finances would undermine the efficacy of the Institution and the justification for the law, and ultimately the constitutionality of its application.

The State claims that the Court in *Allen v. Illinois*, 478 U.S. 364 (1964), "focused on the statutory language rather than the actual daily conditions of confinement experienced by Allen." Pet. Br. at 22. To the contrary, the Court in *Allen* stressed the importance of both the language and the administrative application of the statute, and, in effect, criticized the petitioner for his failure to present evidence of the allegedly prison-like conditions:

> Petitioner has not demonstrated, and the record does not suggest, that "sexually dangerous persons" in Illinois are confined under conditions incompatible with the State's asserted interest in treatment. Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case. But the record here tells us little or nothing about the regimen at the psychiatric center, and it certainly does not show that there are no relevant differences between confinement there and confinement in the other parts of the maximum-security prison complex. . . . We therefore cannot say that the conditions of petitioner's confinement themselves amount to "punishment" and

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[9] This Court granted certiorari in a later version of *Sas*, but later dismissed it as improvidently granted. *Murel et al. v. Baltimore City Criminal Court et al*, 407 U.S. 355 (1972), reviewing *Sas v. Maryland*, 295 F.Supp. 389 (Md. 1969), and *Tippett v. Maryland*, 436 F.2d 1153 (CA4 1971).

> thus render "criminal" the proceedings which led to confinement.

478 U.S. at 373-74.

Allen, Hendricks, Schall, Flores, and *Pearson* all make clear that while the legislature's stated intent is entitled to deference, legislatures may not mask punitive purposes with disingenuous phrasing. As the Court stated in *Cummings v. Missouri*, 4 Wall 277, 325, 71 US 277, 325 (1867)[10]:

> The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name . . . . If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

The above—cited cases are consistent with over a hundred years of this Court's jurisprudence in such disparate areas as Free Speech,[11] Voting Rights,[12] Establishment[13] and Free

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[10] The Court restated *Cummings* five years ago in *U.S. Term Limits, Inc. v. Thornton*, 514 U. S . 779, 829 (1995) : "As we have often noted, " ' constitutional rights would be of little value if they could be . . . indirectly denied." *Harman v. Forssenius*, 380 U.S. 528, 540, 14 L. Ed. 2d 50, 85. S. Ct. 1177 (1965), quoting *Smith v. Allwright*, 321 U.S. 649, 664, 88 L. Ed. 987, 64 S. Ct. 757 (1944). The Constitution "nullifies sophisticated as well as simple-minded modes" of infringing on constitutional protections. *Lane v. Wilson*, 307 U.S. 268, 275, 83 L. Ed. 1281, 59 S. Ct. 872 (1939); *Harman v. Forssenius*, 380 U.S. at 540-541.

[11] *Grosjean v. American Press Company*, 297 U.S. 233, 250 (1936); *United States v. Eichman*, 496 U.S. 310, 315 (1990); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ;

[12] *Gomillion v. Lightfoot*, 364 US 339 (1960); *Reno v. Bossier Parish School Bd.*, 137 L.Ed.2d 730 (1997).

[13] *Edwards v. Aguillard*, 482 US 578 (1987); *Bowen v. Kendrick*, 487 U.S. 589 (1987); *Bd. of Education of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994);

Exercise[14] of Religion, Fifth Amendment Takings,[15] Equal Protection,[16] right to an Impartial Jury,[17] and Self-Incrimination,[18] in all of which the Court has considered the application of statutes—as opposed to mere statutory language—in determining whether legislative enactments are constitutional. As the Court held in *Church of Lukumi v. Hialeah*, 508 U.S. 520, 534 (1993):

> We reject the contention. . . that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative.

Accord Bd. of Education of Kiryas Joel Village School Dist. v. Grumet, 512 U. S . 546 (1994) ; *Turner Broadcasting System, Inc. v. SCC*, 512 U.S. at 645-46. And as stated in *Gomillion v. Lightfoot* , 364 US 339, 347 (1960): "Acts generally lawful may become unlawful when done to accomplish an unlawful end."

In *Yick Wo v. Hopkins*, 118 US 356 (1886), the court found a city ordinance unconstitutional despite its unexceptional language, upon finding that it was applied almost exclusively against persons of Chinese ancestry. The Court held:

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[14] *Church of Lukumi v. Hialeah*, 508 US 520 (1993);

[15] *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986); *Eastern Enterprises v. Apfel*, 141 L.Ed.2d 451 (1998).

[16] *Yick Wo, supra; Soon Hing v. Crowley*, 113 U.S. 703 (1885); *Missouri ex rel Gaines v. Canada*, 305 US 337 (1938); *McLaurin v. Oklahoma State Regents*, 339 US 637 (1950); *Sweatt v. Painter*, 339 US 629 (1950); *Washington v. Davis*, 426 US 229 (1976); *Arlington Heights v. Metro Housing Corp.*, 429 US 252 (1977); *Personnel Adin'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Columbus Bd. of Education v. Pennick*, 443 US 449 (1979)

[17] *Smith v. Texas*, 311 U.S. 128 (1940).

[18] *United States v. Ward*, 448 U.S. 242 (1980); *Allen v. Illinois*, 478 U.S. 364 (1986).

> the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws . . . .

118 U.S. at 373. (Emphasis added.) The Court stated that even a facially fair statute would be unconstitutional "if it is applied and administered with an evil eye and an unequal hand" *Id.* (Emphasis added.) *Accord, Gomillion, supra.*

In *Arlington Heights, supra,* 429 U.S. at 266, the Court, relying on *Yick Wo* and *Gomillion*, inferred improper legislative motive from the application of a statute:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action . . . may provide an important starting point.

There is nothing impossible or even unusual about requiring the district court on remand to decide whether Mr. Young has presented the "clearest proof" of pervasive, long-standing unconstitutional conditions.

The State is incorrect in claiming that Mr. Young's "as applied" challenge is beyond the bounds of inquiry.

(2) The Court should consider legislative history in conjunction with conditions at the Special Commitment Center in determining the constitutionality of Wash. Rev. Code 71.09.

As the Court wrote in *Arlington Heights, supra,* 429 U.S. at 268, legislators' statements can be critical in determining whether a statute was enacted with improper purpose:

> The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.

Such history is equally relevant in unmasking a legislature's intent to impose constitutionally impermissible punishment. As the Court noted in *United States v. O'Brien*, 391 U.S. 367, 383, n.30 (1968):

> The inquiry into whether the challenged statute contains the necessary element of punishment has on occasion led the Court to examine the legislative motive in enacting the statute.

See, e. g., Kennedy v. Mendoz-Martinez , supra, 372 U.S. at 171-174. The Seventh Circuit summarized the applicable law in *Grossbaum v. Indianapolis-Marion Cty. Building*, 100 F.3d 1287, 1292 (7th Cir. 1996) (Easterbrook, J .):

> Motive is, of course, relevant to a number of constitutional claims. . . . [C]ases under the Establishment Clause or the Bill of Attainder Clauses may require courts to query the subjective intentions of legislators for possible illicit motives. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 585, 107 S.Ct. 2573, 2578, 96 L.Ed.2d 510 (1987) (legislature's "actual purpose" to promote religion invalidates statute); *United States v. Lovett*, 328 U.S. 303, 313-14, 66 S.Ct. 1073, 1077-78, 90 L.Ed.2d 1252 (1946) (circumstances of bill's passage showed that its purpose was to punish particular individuals).

In *Edwards v. Aguillard, supra*, for example, the Court viewed the results of a statute together with the statements of its chief proponent in overturning a law supporting the teaching of "creationism" in public schools. 482 U.S. at 587. In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court noted the difficulty of proving legislative motivation, but found this difficulty overcome by the statements of delegates and later comments by historians. *See also Kiryas Joel, supra.*

The State cites *Kennedy v. Mendoza-Martinez, supra*, as authority for limiting review to the language of the Statute. Pet Br. at 17, 19. But the Court in *Mendoza-Martinez* refused to wear such blinders. After listing the seven well-known guidelines for reviewing statutory language, the Court held:

> Here, although we are convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary, because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive. (372 U.S. at 169.)

Here, too, the objective manifestations of the legislature's purpose indicate that Wash. Rev. Code 71.09 was intended to punish previously punished offenders. In this case, unlike *Martinez* and *Hendricks*, the Court has the benefit of ten years of evidence of unconstitutional application of the Statute to supplement the legislative history.[19] Precedent clearly requires consideration of both the application of the Statute and the legislative history behind it.[20]

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[19] The amici states argue that *Hendricks* addressed conditions of confinement "within the context of evaluating legislative intent." Amici Br. at12. Amici's intepretation is consistent with caselaw and with Mr. Young's argument. The *Hendricks* court found that conditions in the Kansas facility were non-punitive. But a finding that the conditions were punitive would have been powerful evidence of legislative intent to punish under the guise of civil commitment.

[20] This Court has never decided whether a punitive purpose alone is sufficient grounds to overturn a statute under the Ex Post Facto clause. *Lynce v. Mathis*, 519 US 433,442-3 (1997). Because Mr. Young alleges that RCW 71.09 is punitive in both purpose and effect, the question unanswered in *Lynce* can remain unanswered here.

The Court has found, however, that unconstitutional conditions alone can trump the benign intent of the legislature. In *Eastern Enterprises v. Apfel*, 524 U.s. 498, 528 (1998), for instance, this Court explored the constitutionality of mandatory pension legislation solely in terms of the effect of its administrative application:

(3) Legislative history clearly indicates that commitment under the Statute was designed to evade prohibitions against Double Jeopardy and Ex Post Facto laws.

There is little doubt that the primary motive behind the Washington statute was to keep sex offenders in prison.

While Mr. Young was serving his sentence, a number of shocking crimes occurred in Washington causing widespread public fear and outrage. Such crimes provoked criticism of the criminal justice system, which was viewed as lenient toward sex offenders. Concern was expressed over a "gap" in the criminal laws permitting dangerous sex offenders to be released into the community after completing their prison terms. There was a cry for tougher criminal penalties for sex crimes and for a legal mechanism to detain persons who were about to be released from criminal incarceration. *See Scheingold, et al.*, The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation, 15 U. Puget Sound L. Rev. 809, 816-18 (1992) (describing the mood of

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> Our decisions . . . have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience. . . . We believe that the Coal Act's allocation scheme, as applied to Eastern, presents such a case.

Id. at 528-9 (emphasis added). *Accord Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986).

Eastern is closely analogous to the case at hand. Nothing in the language of the Coal Act led the Court to its finding of unconstitutionality. Nor was there a finding that Congress passed the act with improper motive. Conditions at SCC alone are enough to prove a violation of the Double Jeopardy, Ex Post Facto, and Due Process clauses.

Here, as in *Eastern*, the flaw in the legislation is found in the way it is applied by an administrative agency. The fact of Mr. Young's ten years of incarceration under punitive conditions must prevail, even if the legislature's hands were clean of improper purpose.

public outrage and the role of victims advocacy groups in the bill's passage). *See, also*, the District Court's first opinion in *Young v. Weston*, 898 F.Supp. 744, 746, n.l.

In response, Governor Booth Gardner commissioned the Task Force on Community Protection. The Task Force proposed the "Community Protection Act of 1990," subtitled "an act relating to criminal offenders." ER 22, III-1.

The Task Force was created principally to answer one question: What gaps in our law and administrative structures allow the release of known dangerous offenders who are highly likely to commit very serious crimes? JA-15, Final Report at II-20. The Task Force emphasized: "[W]e must have the means to detain sexually violent predators whose confinement is not insured by our current laws." Final Report, IV-7. ER 22.

The Community Protection Act significantly enhanced criminal penalties for sex offenses in Washington. See Wash. Rev. Code 9.94A.310; -.320; and -.360(17). But lengthening future sentences did not satisfy the Task Force. David Boerner, chief drafter of the Act, realized that:

> [Longer sentences] could be applied only to crimes after the effective date of the reform because of the constitutional prohibition against retroactive increases in criminal punishment.

He added:

> I had no doubt that if the legislature was to extend the length of sentences previously imposed, the courts would find the legislation unconstitutional. *While the members of the Task Force could accept that legal judgment, they could not accept the result.*

Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. Puget Sound L. Rev. 535, 549-50 (1992) (emphasis added).

During legislative hearings Boerner testified:

> [U]p to now, under the criminal law['s] generally accepted principles, one can't impose penalties retroactively. People who are in the system now, in prison, being prosecuted now, must have their sentences and the length of those sentences determined by the law that was in existence at the time of their crime. And so we have a number of people who are under the old law who simply can't be charged under the criminal law.

Senate Committee Hearing, January 10, 1990, ER 17 at 1.

The Task Force saw its role as closing this "gap." JA-15. Boerner testified: "[the Task Force] did not begin with the intent to create a civil commitment system that would address the problem." ER 17, supra, at 1. The Task Force proposed the civil commitment of "sexually violent predators" under a new scheme wholly separate from Washington's traditional mental illness statute, the "Involuntary Treatment Act", Wash. Rev. Code 71.05, *et seq.*, explaining:

> Civil commitment under the involuntary treatment law allows indefinite commitment, but is quite restrictive in its definitions. Under current laws, sexually violent predators only qualify for civil detention when a mental illness or mental disorder is present. The Task Force examined the histories of some individual violent predators who had been judged not to have a mental illness or mental disorder and therefore were not detainable. The Task Force concluded that existing laws do not offer a sufficient safety net for confinement of sexually violent predators who meet these end points. The Task Force believes a safety net must be created to reduce future acts of violence.

Final Report, ER 22 II-21, emphasis added. The Task Force was clear about its purpose in proposing 71.09: to keep criminals locked up after the conclusion of their sentences.

(4) Legislative inaction in the face of persistently unconstitutional administrative application of a statute is proof of unconstitutional purpose in passing the statute.

The Statute prohibits the use of State mental hospitals for the treatment and confinement of "civilly committed" sex offenders. Wash. Rev. Code 71.09.060(3) . The consequence, all too foreseeable, was Mr. Young's detention in a punitive, non-therapeutic environment for ten years. As the Court held in *Columbus Bd. of Education v. Pennick*, 443 US 449, 465 (1979):

> Adherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.' (Citation no. omitted.)

The consequences became evident to the legislature in 1994, when Judge Armstrong found the conditions at the Special Commitment Center unconstitutional, JA-89, and Judge Dwyer enjoined the State to correct the deficiencies. JA-65-68. Both judges cited the crucial need for conditional release programs. JA-67,90. The legislature responded, in 1995, by passing amendments to the Statute making it harder to qualify for conditional release, but without creating, funding, or even suggesting the creation of release programs. Wash. Rev. Code 71.09.090-.098. App.Pet. 124a et. seq. *See infra*.

In *United States v. City of Yonkers*, 96 F.3d 600, 614 (2nd Cir. 1996), the court found intent to segregate where the State knew that schools were segregated and did nothing to fix the problem. As this Court held in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980):

> [L]egislative silence is not always the result of a lack of prescience; it may instead betoken permission or, perhaps, considered abstention from regulation.

After sixteen orders in five years from Judge Dwyer, after the award of damages in *Sharp*, there can be no claim of "lack of prescience" in the case at hand. The legislature's silence can only betoken permission to punish SCC residents.

(5) *Hudson v. United States* is inapplicable to cases involving incarceration.

The State's argument requires a finding that *Hudson* overturned over a century of precedent, *sub-silentio*. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) provides a far more rational explanation of the Court's unwillingness to apply double jeopardy/ex post facto analysis to the civil fines at issue in *Hudson*: another constitutional protection made it unnecessary. As the *Eastern* majority pointed out, deprivations of property and deprivations of freedom are subject to different kinds of constitutional review:

> Our Constitution expresses concern with retroactive laws through several of its provisions, including the *Ex Post Facto* and Takings Clauses. *Landgraf, supra*, at 266, 128 L.Ed.2d 229, 114 S.Ct. 1483. In *Calder v. Bull*, 3 Dall 386, 1 L.Ed. 648 (1798), this Court held that the *Ex Post Facto* clause is directed at the retroactivity of penal legislation, while suggesting that the Takings Clause provides a similar safeguard against retroactive legislation concerning property rights. See id. at 394, 1 L. Ed. 648 (Chase, J.) ('The restraint against making any *ex post facto laws* was not considered, by the framers of the constitution, as extending to prohibit the depriving of a citizen even of a vested right to property; or the provision, 'that private property should not be taken for public use, without just compensation, was not necessary.')

Id. at 533.

Hudson involved only property rights, a subject not contemplated under the ex post facto or double jeopardy clauses. *Eastern*, 524 U.S. at 533. As *Hudson* explained:

> The Eighth Amendment protects against excessive civil fines, including forfeitures. . . . The additional protection afforded by extending double jeopardy protections to proceedings heretofore thought to be civil is more than offset by the confusion created by attempting to distinguish between "punitive" and "nonpunitive" penalties.

522 U.S. at 103. Like his counterpart in *Eastern*, Mr. Hudson had no need of Ex Post Facto/Double Jeopardy protection; he had other remedies available. The sanctions against him—a fine and a professional debarment—were " 'certainly nothing approaching the 'infamous punishment' of imprisonment.' " *Hudson*, 522 U.S. at 104, quoting *Flemming, supra*, 363 U.S. 603, 617.

Flemming found that "[n]o affirmative disability or restraint is imposed" in the denial of social security benefits to deported Communists. *Id. accord, Harisiades v. Shaughnessy*, 342 U.S. 580 (1951). The Court in *Hudson* similarly relied "on the historical support for the notion that [in rem] forfeitures are civil and thus do not implicate double jeopardy." 522 U.S. at 102, citing *United States v. Ursery*, 518 U.S. 267 (1996).[21]

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[21] The State cites Amar, *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807 (1997) in its brief as a source for its narrow reading of the Double Jeopardy clause and broad construction of *Hudson*. But even Prof. Amar distinguishes between monetary fines and imprisonment for Double Jeopardy purposes. He explains:

> It is, after all, precisely the obvious contrast between "life and limb" on the one hand, and mere "money," on the other, that drives the drama of Shakespeare's great meditation on law, lawyers, and hyperliteralism, *The Merchant of Venice*.

Id. at 1811.

The Court distinguished between civil and criminal forfeitures in *United States v. Bajakanian*, 524 U.S. 321, 331-32 (1998), another post-Hudson case:

> Traditional in rem forfeitures were . . . not considered punishment against the individual for an offense . . . . Recognizing the nonpunitive character of such proceedings, we have held that the Double Jeopardy Clause does not bar the institution of a civil, in rem forfeiture action after the criminal conviction of the defendant.

But the *Bajakanian* court had "little trouble" finding that even forfeiture would constitute criminal punishment if it "is imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony." *Id.* at 328.

Because only property was involved, there was no need for the Court in *Hudson* to look beyond the face of the Statute in assessing its constitutionality under the Double Jeopardy clause. [22] Here, on the other hand, the sanction (a) is more

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Amar discusses the problem of "a criminal wolf disguised in civil sheep's clothing" in his analysis of *Dept. of Revenue v. Kurth Ranch*, 511 U.S. 767, 888 (1994), suggesting the remedy lies in Due Process rather than the Double Jeopardy clause. 106 Yale L.J. at 1834. Under either clause, punishment of Mr. Young pursuant to allegedly civil proceedings remains unconstitutional.

[22] Recent federal case law leads to the same conclusion. The *Hudson* rule has been applied almost exclusively to cases of fines, forfeitures, and debarments. In *S.A. Healy v. Occupational Safety & Health Review*, 138 F.2d 686, 688 (7th Cir. 1998, the court found that civil fines imposed under the Occupational safety and Health Act were non-punitive under the double jeopardy clause, holding:

> The exaction is financial . . . and money penalties have not been viewed historically as criminal punishment. *Hudson*, — U.S. at —, 118 S.Ct. at 495. . . . .

Similarly, in *United States v. Beaty*, 147 F.3d 522, 525 (6th Cir. 1998) the court cited the "affirmative disability" / "infamous punishment" language of *Nestor v. Flemming* in finding that a tax on wagering did not violate double jeopardy.

akin to "the infamous punishment of imprisonment" than to a civil forfeiture, (b) requires conviction of an underlying felony, and (c) is imposed upon culmination of a criminal sentence. *Hudson* is simply inapplicable.[23]

(6) Due Process Does Not Permit Mr. Young To Be Punished Under a Commitment Statute

The State suggests that even if Mr. Young is being punished, his punishment is neither successive nor ex post facto. But the State fails to explain how Mr. Young can constitutionally be subject to any punishment under the Due Process clause. *See Youngberg v. Romeo*, 457 U.S. 307, 314 (1982). In *Hudson v. United States, supra*, the Court relied on *Kennedy v. Martinez-Mendoza, supra*, in determining whether a civil fine could be considered punitive under the Double Jeopardy clause. But *Mendoza-Martinez* is not a

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The only applications known to respondents of the *Hudson* facial relationship language to actual confinement are *United States v. Mayes*, 158 F.3d 1215 (11th Cir. 1998); and *New Jersey v. Black*, 153 NJ 438, 710 A.2d 428, 432 (1998), both finding double jeopardy analysis inapplicable to the loss of "good time" pursuant to prison discipline. Both cases analyze loss of good time as an administrative act pursuant to lawfully imposed punishment, rather than as separate punishment. No one challenged the State's power to impose a criminal sentence on either Mayes or Black. By contrast, there are no permissible grounds for any sanction in the case at hand.

[23] *Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*,—U.S.—145 L. Ed. 2d 610 (2000), leads to the same result through a slightly different analysis. There, the Court noted that Congress included "deterrence and retribution" among the purposes for civil fines to be imposed under an environmental protection statute. No mention was made of double jeopardy. But deterrence and retribution are "the two primary objectives of criminal punishment." *Hendricks*, 521 U.S. at 361-2. Civil laws with punitive purpose or effect were described as permissible in *Friends of the Earth* and impermissible *in Hendricks, Schall*, and the list of cases cited *supra*. There is only one way to distinguish among them: *Friends of the Earth* involves only monetary penalties, whereas *Hendricks et al.* involve deprivation of physical liberty.

double jeopardy case; the Court found the statute therein unconstitutionally punitive as a matter of due process. Similarly, in *Schall v. Martin, supra; Reno v. Flores, supra;* and *United States v. Salerno*, 481 U.S. 739 (1987), the Court stressed that punitive conditions could render otherwise permissible legislation unconstitutional under the due process clause. Even though neither Double Jeopardy nor Ex Post Facto violations were alleged, the allegedly punitive nature of the statutes therein remained crucial in all three cases.

"At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Prison-like conditions, with "no therapeutic or security-based justification" JA-132, cannot be reasonably related to the purpose of commitment.

This Court may not need to reach the issue of whether the Statute constitutes double jeopardy as applied. If its application violates the due process clause, Mr. Young's commitment must be overturned.

(7) This Court distinguishes between incidental and pervasive illegality in determining whether statutes are rendered unconstitutional by the administration thereof.

The State raises the spectre of statutes being overturned on the basis of short periods of punitive application. Pet. Br. at 29. The State's concern is inapplicable in the case at hand: as both federal and state court decisions show, conditions at SCC have never been adequate during the nearly ten years of Mr. Young's commitment.

A state institution might slip below constitutional standards during troubled times, or, as in *Kansas v. Hendricks*, might be too new to permit assessment of compliance with constitutional requirements. 521 U.S. at 367-68. Here, on the other hand, the Ninth Circuit found that if conditions have been as bad as Mr. Young claims for as long as Mr. Young

claims, the Statute itself is unconstitutional as applied to Mr. Young. *Young v. Weston, supra*, 192 F.3d at 873-76.

The courts are well able to distinguish between passing and pervasive unconstitutionality. *Farmer v. Brennan*, 510 U.S. 825, 846, n.9 (1994), for instance, clearly distinguishes fleeting constitutional failings from the kind of entrenched resistance exhibited by the State herein:

> If, for example, the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness . . . . At the same time, even prison officials who had a subjectively culpable state of mind when the lawsuit was filed could prevent issuance of an injunction by proving, during the litigation, that they were no longer unreasonably disregarding an objectively intolerable risk of harm and that they would not revert to their obduracy upon cessation of the litigation.

Here, the pervasive unconstitutionality of conditions at SCC was clearly and repeatedly established by the District Court in *Turay v. Seling, supra*. The State cannot plausibly claim lack of awareness. The State remains obdurate, more than five years after the issuance of the injunction, despite sixteen orders from Judge Dwyer detailing its failure to rectify unconstitutional conditions at SCC .[24]

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[24] Any meaningful progress has been due to the District Court's contempt order and the threat of sanctions. *See Turay v. Seling, supra*, Findings, Conclusions, and Order dated November 15, 1999, holding the State in contempt and delaying imposition of sanctions. As the District Court judge in *Turay* observed:

> The chief cause of non-compliance, as found in the November 15, 1999 order, has been the State's failure to provide needed resources. The past few months have seen significant changes for the better.

Pet. Lodging, Order May 5, 2000, at 10. The court wrote:

(8) Contrary to the State's argument, the scope of the Double Jeopardy clause is not limited to protection against successive trials.

The State argues:

> The historic purpose of the double jeopardy clause is to protect persons from a second trial for the same offense. This purpose is given effect by a facial inquiry, not an 'as applied' test.

Pet. Br. at 12. This assertion is refuted by *North Carolina v. Pearce*, 395 U.S. 711, 717-18 (1969):

> "[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it."

Quoting *Ex parte Lange*, 18 Wall. 163, 168 (1873). *Accord, Helvering v. Mitchell*, 303 U.S. 391, 399 (1938); *One Lot Emerald Cut Stones*, 409 U.S. 232, 237 (1972); *Hudson*, 522 U.S. at 102.

The State's reductionist view of Double Jeopardy leads to a second error: its claim that Double Jeopardy protection is unavailable after trial. Pet. Br. at 25. Mr. Young argued before trial that the conditions of confinement rendered Wash. Rev. Code 71.09 unconstitutional. ER 45. His request for an evidentiary hearing was denied by both the trial court and the Washington Supreme Court. JA-32. Even if, as the State claims, Double Jeopardy challenges are limited to pre-trial proceedings, Mr. Young clearly raised the issue in a timely fashion.[25]

"There is no doubt that this effort was caused by the contempt order." *Id.* The State thus cannot show that it would not "revert to obduracy" should Judge Dwyer lift his injunction.

[25] The Ninth Circuit found that "the Washington state courts did not afford Young a full and fair hearing concerning the conditions of confinement in the Special Commitment Center." *Young v. Weston, supra*, Pet. App. 11a.

The completion of trial is no bar to Double Jeopardy protection. In *Pearce, supra*, for instance, the Court found a Double Jeopardy violation where a trial court failed to credit the petitioner with "good time" upon re-sentencing following appeal, even though no one challenged the validity of petitioner's second trial. Successive punishments are unconstitutional whether or not they follow successive trials.

Finally, the State's argument ignores the separate applicability of the Ex Post Facto clause. This Court has found Ex Post Facto violations where either legislatures or administrative agencies have sought to reduce a prisoner's earned good time. *Weaver v. Graham*, 450 U.S. 24 (1981); *Lynce v. Mathis*, 519, U.S. 443 (1997); *see also Garner, supra*.

The punitive incarceration suffered by Mr. Young for nearly ten years in effect is an increased punishment for the crime which served as the predicate offense for his "commitment". This violates the ex post facto clause. See *Weaver v. Graham*, 450 U.S. 24, 31 ("The critical question [for an ex post facto violation] is whether the law changes the legal consequences of acts completed before its effective date"), accord, *Carmell v. Texas*, 146 L. Ed. 2d 577 (2000).

If Mr. Young is being punished, the Statute is unconstitutional as applied, whether the challenge was raised before or after trial.

(9) The State Cannot Rescue the Statute by Blaming the Executive Branch for the Unconstitutional Application thereof.

The State warns against permitting a rogue executive branch to stymie the benign intent of the legislature. The state cites no authority for its claim that its attorney general can defend the legislature against depredations by the executive

branch, nor for the claim that an administrative agency of the State is somehow a separate entity from the State itself.[26]

The Attorney General and the Department of Social and Health Services are servants of the same sovereign: the State of Washington. *State v. Dupard*, 93 Wn. 2d 268, 273, 609 P.2d 961 (1980), *Thompson v. DOL*, 138 Wn. 2d 783, 794, 982 P.2d 601 (1999). As this Court stated 121 years ago:

> Whoever, by virtue of public position under a state government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the State. This must be, or the constitutional prohibition has no meaning.

Ex parte Virginia, 100 U.S. 339, 347 (1879); *Neal v. Delaware*, 103 U.S. 370, 397, 26 L. Ed 567, 574 (1881).

The legislature is aware of the problems at SCC, but has done nothing to fix them. To the contrary, while the Federal Court Special Master and virtually all other experts have criticized SCC's failure to establish community treatment resources, the legislature in 1995 eliminated the possibility of release to less restrictive alternatives prior to in-patient commitment, making it far more difficult for residents to win conditional release of any kind. Compare previous and current Wash. Rev. Code 71.09.020(1); 71.09.090; 71.09.092;

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[26] The State's sole source for its argument is *Kendall v. United States ex re Stokes*, 371 U.S. 524 (1938). But *Kendall* holds only that the executive has no power to nullify duly enacted legislation. Here, unlike *Kendall*, the executive makes no claim of power to override the law. The Attorney General has appealed Judge Dywer's recent orders. JA-140. The state made what the court described as a "remarkable argument" that SCC must have "an interface" with DOC. JA-146. The state should not be heard to blame and exonerate its own agency for the same conduct in two separate proceedings.

71.09.094; *Detention of Young*, 857 P.2d 989 (1993); *Detention of Brooks*, 94 Wn.App. 716, 973 P.2d 486 (1999); *Detention of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999). By contrast, the legislature has done nothing over the past ten years to address the inadequacies of the SCC treatment program, the prison-like conditions of confinement, or the unavailability of actual community-based aftercare.[27] Not even a federal injunction has spurred the legislature to change. Only when the federal court threatened drastic financial sanctions did the legislature appropriate additional money for the SCC. It is unclear whether the additional funds will make a significant difference.

Under Washington law, the legislature's failure to amend a statute following judicial construction thereof demonstrates approval of the judicial construction. *State of California v. State Tax Coinmn'n*, 55 Wn.2d 155, 158, 346 P.2d 1006 (1959). There is no reason to view the legislative response to the executive's application of a statute in any different light. DSHS cannot be seen as a rogue agency thwarting legislative will, since the legislature has tacitly endorsed the agency's administration of the Statute—through ten years of silence.

(10) Mr. Young does not suffer from a recognized disorder sufficiently precise to serve as grounds for commitment.

(a) *Hendricks* does not reduce constitutional requirements for commitment.

While the Court in *Hendricks* found that "the term 'mental illness' is devoid of any talismanic significance," 138 L.Ed.2d at 513, it did not reject previously established limits

[27] Under Wash. Rev. Code 71.05.025, persons committed under the Involuntary Treatment Act, the traditional civil commitment statute, have access to all of the community treatment services offered under Wash. Rev. Code 71.24, the Community Mental Health Services Act. By contrast, the legislature has failed to establish any community services for persons committed under Wash. Rev. Code 71.09.

on the State's civil commitment powers. The Court explained: "we have never required State legislatures to adopt any particular *nomenclature* in drafting civil commitment statutes." *Id.* (emphasis added). *Hendricks* thus gives the States broad leeway in describing mental disorders subject to commitment, but does not lower the standards established in *Addington v. Texas*, 441 U.S. 419 (1979); and *Foucha v. Louisiana*, 504 U.S. 71 (1992).

Hendricks is fact-specific. Rather than considering all possible applications of the Kansas statute, the Court limited its review to the record in Mr. Hendricks' case.[28] It therefore took great care in analyzing Mr. Hendricks' mental problems. 521 U.S. at 359. The majority emphasized the undoubted validity of his diagnosis and his undoubted inability to control himself:

> The mental health professionals who evaluated
>
> > Hendricks diagnosed him as suffering from pedophilia, a condition the psychiatric profession itself classifies as a serious mental disorder. See, *e.g.*, [American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (DSM)] at 524-525, 527-528. Hendricks even conceded that, when he becomes "stressed out," he cannot "control the urge" to molest children. App. 172. This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.

Id.[29] After reviewing prior case law, the Court concluded:

[28] In all but First Amendment cases, the Court limits vagueness review to the particular facts of the case presented. *See United States v. Mazurie*, 419 U.S. 544, 42 L.Ed.2d 706, 95 S.Ct. 710 (1975).

[29] This language equating disorder with lack of volitional control restates the rule of *Pearson, supra*, where the Court upheld a statute allowing for civil commitment of sexual offenders precisely because it

> To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria and Hendricks' condition doubtless satisfies those criteria.

Id. (emphasis added).

But as Justice Kennedy observed in his concurrence:

> if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.

521 U.S. at 373. In other words, while the states are granted substantial freedom to craft their own terms and definitions of mental disorder, they must use "comparable criteria" for commitment to be constitutional. 521 U.S. at 358: [30]

> These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control.

(b) Mr. Young's alleged condition is not accepted within the psychiatric profession.

Mr. Young's alleged condition is not comparable to the criteria found acceptable for commitment in *Hendricks* or the cases cited therein. The State's expert diagnosed Mr. Young with "paraphilia not otherwise specified, rape," (ER 9, 163) a diagnosis unmentioned in the DSM and which, as the expert admitted, is controversial within the scientific community. ER 10, p.30. Mr. Young's commitment is based on an unrecognized diagnosis with unexplained consequences. It is

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required "*an utter lack of power to control* . . . sexual impulses." 309 U.S. at 274. (Emphasis added.)

[30] In the other cases cited in *Hendricks*, the individual was similarly diagnosed with a "serious disorder" accepted as such by the scientific community. In *Heller v. Doe*, 509 U.S. 312 (1993), *supra*, for example, the disorder was mental retardation. In *Allen*, *supra*, the statute required a finding of mental illness.

"too imprecise a category to offer a solid basis for concluding that civil detention is justified." *Hendricks* (Kennedy, J. concurring), *supra* at 373.

(c) Mr. Young's alleged Personality Disorder is Constitutionally Insufficient Basis for Commitment.

In *Foucha v. Louisiana, supra*, the Court found personality disorders insufficient grounds for civil commitment, even in the presence of proven dangerousness. The Court in *Hendricks* paid little attention to personality disorders; no one claimed that Mr. Hendricks had one. The Court did not purport to overrule *Foucha*.

But even if certain personality disorders were constitutional grounds for commitment, Mr. Young's vaguely defined alleged "personality disorder not otherwise specified" (NOS) would not qualify. The DSM-IV lists ten specific personality disorders—and a non-specific category, "personality disorder not otherwise specified." The ten specific disorders are diagnosed using strict criteria. Antisocial Personality Disorder, for instance, requires proof of any three of fifteen behavioral criteria before age fifteen, and three of seven thereafter. DSM-IV at 90, 649-650. Five of nine criteria must be met for diagnosis of Histrionic or Narcissistic Personality disorders. *Id.* at 657-58, 661.

Diagnosis of Personality Disorder NOS requires no more than

> the presence of features of more than one specific Personality Disorder that do not meet the full criteria for any one Personality Disorder ('mixed personality'), but that together cause clinically significant distress or impairment in one or more important areas of functioning (e.g., social or occupational." *Id.* at 673.

This diagnosis could be applied to most people with a criminal record. It does not "adequately distinguish" Mr. Young from other wrongdoers. *Hendricks* at 360.

(d) The State did not show that Mr. Young lacks volitional control.

The State further failed to establish the requisite element of lack of volitional control. As the DSM stresses:

> the fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his behavior at a particular time.

DSM-IV at xxiii. Neither the expert nor the trial court made findings regarding Mr. Young's ability to control himself.

Mr. Hendricks suffered from a well-established disorder which made him unable to control himself. Mr. Young was diagnosed with an unrecognized mental abnormality and with a personality disorder so broadly defined that it could be applied to any and all criminals, which, together but not separately, allegedly made him likely to re-offend. There was no mention of the effect of these problems on his ability to exercise self-control.

The Court in *Hendricks* determined only that Mr. Hendricks was properly committed. It did not automatically validate all "predator" commitments. The record herein shows that Mr. Young's commitment did not meet constitutional requirements.

(11) Washington's law does not satisfy the standards for constitutionality described in Hendricks.

The State claims that the Washington statute and the "predator" law approved in *Hendricks, supra*, are "identical in all relevant respects." Pet. Br. 2. But Wash. Rev. Code

71.09 differs from the Kansas statute with respect to many of the factors relied upon by the *Hendricks* majority. These differences mandate the conclusion that 71.09 is punitive and thus violates the due process, ex post facto and double jeopardy clauses.

As Justice Kennedy pointed out in his concurring opinion, the majority in *Hendricks* "gives a full and complete explanation why" the Kansas statute is not punitive under the facts presented. But as he cautioned: "All this, however, concerns Hendricks alone." 521 U.S. at 371.

The majority identified factors supporting the facial validity of the Kansas statute (*Id.* at 368):

> Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent.

Washington has not "disavowed any punitive intent," does not provide strict procedural safeguards, does not "permit[] immediate release upon a showing that the individual is no longer dangerous or mentally impaired," and has neither "directed that confined persons be segregated from the general prison population" nor afforded them the same status as other civilly committed persons. Unlike the Kansas statute, Wash. Rev. Code 71.09 must be found punitive.

1. Washington has not disavowed punitive intent.

Like its Kansas counterpart, Wash. Rev. Code 71.09 is labeled "civil" by the legislature. But as noted in *Hendricks*, a "civil label is not always dispositive." 521 U.S. at 515 (citing

Allen v. Illinois, 478 U.S. at 369). The Court in *Hendricks* looked beyond the label and examined (1) whether commitment under the law implicates either of the two primary objectives of criminal punishment: retribution or deterrence; (2) whether commitment is dependent on a finding of scienter;[31] and (3) whether conditions of confinement under the law indicated a punitive purpose. *Id.* at 362-3.[32]

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[31] The *Hendricks* Court noted that scienter is "customarily an important element in distinguishing criminal from civil statutes." 521 U.S. at 362. Under Washington law, however, the concept of "scienter" provides little help. "Washington courts have consistently rejected the argument that intent or knowledge is an element of rape." *State v. Brown*, 78 Wn.App. 891, 894, 899 P.2d 34 (1995). If scienter is unnecessary to prove the underlying criminal offense required for commitment under RCW 71.09, its absence or presence does nothing to distinguish between the criminal law and the allegedly non-criminal commitment statute.

Scienter is required to prove the underlying criminal offense, where the State relies on RCW 71.09.060(b), regarding persons incompetent to face criminal charges. "The presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct." *Carter v. United States*, — U.S. — (2000), quoting *United States v. X-Citement Video*, 513 U.S. 64, 71 (1994). In other words, scienter has more to do with the character of the act than with the state of mind of the perpretrator. None of the offenses described in RCW 71.09.020(6) constitute "otherwise innocent conduct" even in the absence of mens rea. Anyone who engages in such conduct, even if incompetent, therefore does so with scienter.

[32] Civil commitment may not be used to punish. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). If the Statute is punitive, it is unconstitutional under the Due Process, Double Jeopardy, and Ex Post Facto clauses. *See supra*. The *Hendricks* factors are thus unlike the factors listed in *Kennedy v. Martinez-Mendoza*, 372 U.S. 144, 168-169 (1963). Whereas none of the *Kennedy* factors is controlling on the issue of whether a statute violates the Double Jeopardy clause, *Hudson, supra*, 522 U.S. at 101, punitive intent alone is enough to doom the Statute in the case at hand as a violation of due process.

a. Commitment under Wash. Rev. Code 71.09 implicates the goals of retribution and deterrence.

The Court in *Hendricks* held:

> The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes.

Id. at 362. The Court found that in Kansas, a prior conviction was not an "element" of the charge of being a "sexually violent predator." 521 U.S. at 370. Therefore, it held, the prohibition against double jeopardy did not apply.

Under Wash. Rev. Code 71.09, by contrast, a prior conviction or other proof of commission of a "sexually violent offense" is a predicate element of commitment. A petition under the Statute must allege that the respondent was convicted of a "sexually violent offense." Wash. Rev. Code 71.09.030.[33] Commitment cannot occur under the Statute absent proof beyond a reasonable doubt that the individual committed a sexually violent offense. Wash. Rev. Code 71.09.060. In *Detention of Twining*, 77 Wn. App. 882, 888, 894 P.2d 1331 (1995) , the Washington Court of Appeals noted that "the Legislature requires that the suspected sexual predator . . . must have been convicted or charged with a

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[33] The only exceptions are for persons charged with sexually violent crimes and either found incompetent or acquitted on grounds of insanity. *Id.* If the person has been found incompetent, the State must prove the predicate offense at the commitment trial. "[T]he rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply." Wash. Rev. Code 71.09.060.

The legislature did not disavow punitive intent by including incompetents within the scope of the bill. Rather, by enumerating the specific offenses for which even incompetents could be committed, the legislature made clear its intent to punish even those who are not otherwise subject to criminal punishment.

crime of sexual violence. RCW 71.09.020(1). " *Accord In re Henrickson*, Wn.2d __, n.2 (2000).

In Mr. Young's case, the prosecutor's charging document alleged that Mr. Young had been convicted of a specific sexually violent offense, the sentence for which was about to expire. JA-l9. The court instructed the jury that to find Mr. Young a sexually violent predator they must find "each of the following elements" beyond a reasonable doubt, including that he had been "convicted of a crime of sexual violence: specifically, of an act defined in Title 9A RCW as rape in the first degree . . . . " Instruction No. 8, JA-29.[34]

An element, in the criminal context, is a "fact necessary to constitute the crime" and must be proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). The Washington legislature has made commission of the prior crime a fact which must necessarily be proved beyond a reasonable doubt in order to commit someone as a "predator." There can be no doubt, under *Winship*, that proof of the prior crime is an element necessary for commitment under the Statute, rather than a mere fact used for evidentiary purposes. Unlike the Kansas statute, the Washington statute makes commission of a sexual offense "the basis for invoking the commitment proceedings." *Hendricks*, 521 U.S. at 370.[35]

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[34] In another case, respondent Jerry Sharp obtained a dismissal of the "predator" prosecution against him when his prior conviction was reversed on appeal. Assistant Attorney General Sarah Sappington provided a declaration in Mr. Sharp's case, stating that when the court of appeals reversed Mr. Sharp's convictions for sexually violent offenses, "the State was required by law to dismiss its petition." Brief in Opposition to Certiorari, Appendix F. The trial court dismissed the predator petition against him. Brief in Opposition, Appendix G.

[35] In *Jones v. United States*, 526 U.S. 227, 235 (1999), the Court noted that "with perhaps one exception," "Congress had never clearly made prior conviction an offense element *where the offense conduct, in the absence of recidivism, was independently unlawful*." (emphasis added), citing *Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998). In other words, proof of the prior offense is not defined as an element as long as there are independent grounds to convict without it. Here, by contrast, neither Mr. Young's mental condition nor his alleged dangerousness is independent grounds for commitment under the statute, absent proof of the prior offense. Wash. Rev. Code 71.09.060

b. Wash. Rev. Code 71.09 was intended as a deterrent.

The *Hendricks* court concluded that the Kansas law could not be considered deterrent in nature because:

> Those persons committed under the Act are, by definition, suffering from a "mental abnormality" or a "personality disorder" that prevents them from exercising adequate control over their behavior.

521 U.S. at 362. As noted above, commitment under the Washington statute does not require proof of a lack of volitional control. The *Hendricks* presumption of non-deterrent purpose therefore does not apply.

The conditions of confinement outlined above certainly demonstrate deterrent effect and purpose. Potential sex-offenders in Washington now know that an offense leads not only to prison, but also to a second, indefinite imprisonment after completion of a prison term.

2. Washington has not "provided strict procedural safeguards" or "permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired."

a. The Failure to Provide for an Annual Re-Commitment Trial Demonstrates the Punitive Purpose of Wash. Rev. Code 71.09.

The Court in *Hendricks* reasoned that the Kansas statute could not be considered punitive, in part because:

> Commitment under the Act is only potentially indefinite. The maximum amount of time an individual can be

> incapacitated pursuant to a single judicial proceeding is one year. [citation omitted.] If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for initial confinement. [*Id.* at 516.] [36]

Wash. Rev. Code 71.09 is not merely "potentially indefinite;" it is explicitly so. The Washington Court held in *Detention of Petersen*, 138 Wn.2d 70, 81, 980 P.2d 1204 (1999):

> Our sexually violent predator statute unequivocally contemplates an indefinite term of commitment, not a series of fixed one-year terms with continued commitment having to be justified beyond a reasonable doubt *annually* at evidentiary hearings where the State bears the burden of proof.

Instead of annual re-commitment proceedings, Wash. Rev. Code 71.09 provides only for show cause hearings, where the trial court determines whether "probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged." Wash. Rev. Code 71.09.090(2). The show cause hearing is a "summary proceeding" in which the State need not comply with the rules of evidence and the detainee has no right to be present. *Id. Petersen.* There is no right to appeal. *Petersen,*

[36] The Washington Supreme Court wrote that this Court was "simply wrong" in its construction of the annual review provisions in the Kansas statute. *Detention of Petersen*, 138 Wn.2d 70, 79, 980 P.2d 1204 (1999). But whether or not the Kansas statute says what this Court said it does, the fact remains that this Court relied on the perceived annual re-commitment provision as a significant factor in finding the statute constitutional. The Washington court's purported reliance on *Hendricks* to uphold the Washington statute is thus predicated on its disagreement with *Hendricks*. This disagreement undermines the Washington decision, not the importance of an annual re-commitment requirement.

supra. Only upon failure to meet this low "probable cause" standard is the State required to re-prove its case beyond a reasonable doubt. *Detention of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999).[37]

Wash. Rev. Code 71.09 lacks the procedural safeguards of the Kansas statute as interpreted by this Court. This Court's approval of the Kansas statute in *Hendricks* is thus inapplicable to the case at hand.

b. The review procedures in Wash. Rev. Code 71.09 are a "sham" demonstrating the punitive intent of the statute.

In his dissent in *Foucha v. Louisiana, supra*, 504 U.S. at 115, n.10, Justice Thomas noted:

> Foucha has not argued that the State's procedures, *as applied*, are a sham. This would be a different case if Foucha had established that the statutory mechanisms for release were nothing more than window-dressing, and that the State in fact confined insanity acquittees indefinitely without meaningful opportunity for review and release.

(Emphasis added.) Justice Kennedy, concurring in *Hendricks*, echoed Justice Thomas' concerns:

> If the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish.

521 U.S. at 371. The Washington mechanisms for release are nothing more than window-dressing.

Wash. Rev. Code 71.09.092 was enacted in 1995 partly in response to the Washington Supreme Court's directive in

[37] The court in *Petersen* found that the statute placed the burden at the show cause hearing on the committed person. In *Detention of Turay*, the court held that the burden must rest on the State. It did not, however, suggest any change in the statutory language.

Detention of Young, *supra*, that the State provide less restrictive alternatives to total confinement at SCC. *See Young*, *supra*, 122 Wn. 2d at 47.Unfortunately, Wash. Rev. Code 71.09.092 makes it nearly impossible to qualify for a less restrictive alternative absent the active assistance of the State. It states:

> Before the court may enter an order directing conditional release to a less restrictive alternative, it must find the following: (1) The person will be treated by a treatment provider who is qualified to provide such treatment in the state of Washington under chapter 18. 1555 Wash. Rev. Code; (2) the treatment provider has presented a specific course of treatment and has agreed to assume responsibility for such treatment and will report progress to the court on a regular basis, and will report violations immediately . . . ; (3) housing exists that is sufficiently secure to protect the community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person, to provide the level of security required by the court, and immediately report to the court . . . if the person leaves the housing to which he or she has been assigned without authorization; (4) the person is willing to comply with the treatment provider and all requirements imposed by the treatment provider and by the court; and (5) the person is willing to comply with supervision requirements imposed by the department of corrections.

The new legislation provides no mechanism for establishing less restrictive alternatives, and allows either the court or the DOC to overrule a jury verdict in favor of conditional release. It requires conditionally released residents to obtain treatment from certified Sexual Offender Treatment Providers (as defined in Wash. Rev. Code 18.155), even while SCC residents are still denied access to certified providers. JA-89. Those who are considered so dangerous that they must be treated in custody are denied the most expert assistance. Those who are amenable to be in the community cannot be

released until they find in the community what they were denied in the institution. Those in need of the most help are denied the most qualified helpers. Clearly, the legislature deems certification of treatment providers necessary not for treatment purposes, but only to deny meaningful access to less restrictive alternatives.

The review provisions of Wash. Rev. Code 71.09 are thus a sham, leaving committed persons "without meaningful opportunity for review and release." *Foucha*, (Thomas, J., dissenting), *supra*. The Statute is unconstitutional.

3. Washington has not "directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed"

In *Hendricks*, this Court found it "significant" that the detainees were "placed under the supervision of the Kansas Department of Health and Social and Rehabilitative Services." *Id.* at 519. Unlike the statute in *Hendricks*, Wash. Rev. Code 71.09.028 grants DOC control over all conditionally released persons. The legislature could have assigned mental health case managers to supervise conditionally released SCC residents. Instead, it chose to use an agency whose statutory charter is to punish offenders. Wash. Rev. Code 72.09.010.[38]

The Statute prohibits even the building of a secure "state mental hospital" for 71.09 detainees, leaving the Department of Social and Health Services with no alternative to placing

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[38] The statute reads in pertinent part:

> It is the intent of the legislature to establish a comprehensive system of corrections for convicted law violators. . . . (2) The system should punish the offender for violating the laws of the state of Washington.

71.09 detainees in a prison facility. If they ever are released, it is to the control of DCC.

(12) 42 U.S.C. 1983 is an Inadequate Remedy for Mr. Young's Incarceration under an Unconstitutional Statute.

By claiming that an action under 42 U.S.C. 1983, rather than habeas corpus, is the appropriate remedy, the State misapprehends the crux of both the Ninth's Circuit's opinion and Mr. Young's argument: that the punitive application of the Statute renders the Statute itself unconstitutional.[39]

In *Reno v. Flores, supra*, the Court found "no evidence . . . that habeas corpus [was] insufficient to remedy particular abuses" of the challenged regulation. The State does not explain how the remedy explicitly recommended for detained immigrants in *Flores* could be inappropriate for a detained civil commitment respondent in the case at hand.

Mr. Young challenges the validity of his detention under a statute which has proven unconstitutional in effect. Habeas is the appropriate remedy. *See, Carafas v. LaVallee*, 391 U.S. 234, 238 (1968).

The State's own actions betray the inadequacy of 42 U.S.C. 1983 as a remedy for Mr. Young. The Hon. William Dwyer entered his injunction in *Turay v. Weston* on June 6, 1994. JA-64 et.seq. More than five years after the injunction, the State itself acknowledged "that the minimum professional standards for treating sex offenders were not yet fully met and that the goal of providing constitutionally adequate mental health treatment was still unattained." Lodging of Petitioner at 8. The court held that the record showed "footdragging which has continued for an unconscionable time" and that

[39] In *Yick Wo*, for instance, this Court did not merely demand equal treatment for white and Chinese laundrymen. Upon finding the law discriminatory in effect, this Court struck down the law.

"the defendants have failed to take all reasonable steps within their power to comply or substantially comply with the injunction, and have intentionally disregarded the injunction's requirements." *Id.* at 18. Judge Dwyer held the State in contempt. *Id.* at 20. The State has appealed both the contempt order and an earlier intermediate order continuing the injunction. (See, Order Denying, JA-140.)

The effectiveness of a 42 U.S.C. Sec. 1983 judgment is limited by the State's willingness to comply with injunctive relief and readiness to absorb financial loss as the price of non-compliance. The Sharp plaintiffs were each awarded $10,000 damages (totaling $150,000). The state paid $250,000 in attorney fees in 1998, and the case is still ongoing. Pet. Lodging, Order-6. The detainees nonetheless remain unconstitutionally incarcerated under punitive conditions under a punitive law. Habeas corpus is the only adequate remedy in the face of the State's intransigence.

(13) The Facial Validity of the Washington Statute and the Imprecision of 'Mental Abnormality' Are Fairly Comprised By the Question Presented

While the facial validity of Washington's statute and the implementation of "mental abnormality" are not outlined in the questions presented by the state in its petition for certiorari, they are "fairly comprised" by the question presented. *Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978). In addition, the state argues at length that the statute is constitutional on its face, and claims that "it is not disputed". Pet. Br. 15 et. seq. Mr. Young does in fact dispute this claim.

CONCLUSION

This case concerns not only the failure of the state of Washington to provide adequate treatment for nearly ten

years. It also concerns the purpose and effect of the "predator" statute as evidenced by the failure to provide treatment, by the deliberate incarceration of Mr. Young in a prison, with fewer rights and opportunities than when he was a sentenced criminal prisoner, by the systemic verbal abuse toward Mr. Young by "treatment" staff in the first few years of the program, by the legislature's refusal to improve the situation at the SCC, and by the application of the law to people who have volitional control, such as Mr. Young. Unlike what the Court found to be the case in Kansas, Mr. Young has not enjoyed the same conditions of confinement, opportunities for treat-ment, or opportunities to engage with family and friends in the community that a civilly committed mentally ill person enjoys.

The Court of Appeals correctly remanded this case for an evidentiary hearing to determine whether Mr. Young could show by "the clearest proof" that the Washington "predator" law is unconstitutionally punitive in purpose and effect. This Court could find the statute unconstitutional based on the record herein, without the necessity of remand. At a minimum, this Court should affirm the Court of Appeals' order remanding this case for an evidentiary hearing regarding the punitive nature of Mr. Young's nearly decade-long incarceration.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

MARK SELING, Superintendent,
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The Question Presented in this case is "[w]hether an otherwise valid civil commitment statute can be divested of its civil nature and held to violate the double jeopardy and *ex post facto* clauses because the administrative agency operating the commitment facility fails to provide treatment and other conditions of confinement mandated by the statute at some time during the individual's commitment."

Only a fraction of Young's brief addresses the question before the Court – the appropriate test for determining the civil versus criminal nature of Washington's Statute. Much of Young's brief ignores this threshold question and argues that the Statute is unconstitutional. Young also focuses on an array of legal issues that are not remotely subsumed within the Question Presented, seeking to modify the judgment below. The Ninth Circuit rejected Young's facial double jeopardy, *ex post facto*, and substantive due process challenges to the Statute, as well as numerous challenges specific to his commitment. Young did not petition (or cross petition) for review of these issues and is barred from raising them. *See Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976).

In the remainder of this brief, the State replies to those arguments made by Young that are directed to the Question Presented (Parts I and II). The State then briefly responds to issues not properly before the Court, but discussed at length by Young, lest the State be understood to accede to Young's arguments (Part III).

ARGUMENT

I. Washington's Statute Is A Civil Commitment Law

A. This Case Presents The Threshold Question Of Whether The Civil Or Criminal Nature Of A Statute Is Determined From The Face Of The Law Or "As Applied"

This Court has developed a two-part test to determine whether a particular proceeding or remedy is civil or criminal. First, the Court looks to see whether the Legislature expressly or impliedly labeled the law as civil or criminal. *Hudson v. United States*, 522 U.S. 93, 99 (1997). Second, if the Legislature has adopted the civil label, the Court inquires whether the "statutory scheme" is so punitive, either in purpose or effect, as to transform a civil remedy into a criminal penalty. *Id.* The civil versus criminal inquiry is a threshold question. A Court must first determine whether a law is civil or criminal before it can determine the applicable constitutional limits on the Legislature's authority to adopt the law, such as the double jeopardy and *ex post facto* clauses.

This case presents the narrow but important question of whether the second part of the test is considered in relation to the statute on its face or "as applied". In this context, "as applied" does not refer to the constitutionality of a statute as applied. Rather, it refers to the threshold question of the civil versus criminal nature of a statute and whether the Court considers the application of the statute in that inquiry.

B. *Hudson v. United States* Requires That The Civil Or Criminal Nature Of A Law Be Determined On Its Face, Not "As Applied"

Hudson disavowed an "as applied" approach for determining whether a statute imposes a civil or criminal remedy. Referring to *United States v. Halper*, 490 U.S. 435, 447 (1989), the Court explained, the "second significant departure in *Halper* was the Court's decision to 'assess the character of the actual sanctions imposed'". *Hudson*, 522 U.S.

at 101. The Court in *Hudson* emphasized that, in determining the civil or criminal nature of a remedy, the nonexclusive factors of *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), "must be considered in relation to the statute on its face". *Hudson*, 522 U.S. at 100 (quoting *Kennedy*, 372 U.S. at 169). *Hudson* did not announce a new principle in this respect. "This Court has often stated that the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction." *United States v. Ward*, 448 U.S. 242, 248 (1980).

Young advances four arguments to avoid the holding in *Hudson*. In the first, he attempts to distinguish *Hudson* from the case at bar. According to Young: "*Hudson* involved only property rights, a subject not contemplated under the *ex post facto* or double jeopardy clauses." Resp. Br. at 31.

Young mischaracterizes *Hudson*. In *Hudson*, the Court applied the two-part test to determine the threshold question of whether the law authorizing the fine was civil or criminal. *Hudson*, 522 U.S. at 99. The double jeopardy clause did not apply because the law was civil. *Hudson*, 522 U.S. at 94. If the Court had concluded that the purpose and effect of the fine was criminal punishment, it would have applied the double jeopardy clause even though only property was involved. *See Department of Rev. of Montana v. Kurth Ranch*, 511 U.S. 767, 783 (1994) (Montana tax on dangerous drugs is characterized as punishment for purposes of the double jeopardy clause).

Another distinction Young asserts is that the Court did not apply the double jeopardy clause in *Hudson* because it was unnecessary in light of other constitutional protections, such as the Eighth Amendment prohibition against excessive civil fines. Resp. Br. at 31-33. The holding in *Hudson* was not based on the Court's passing observation that other constitutional protections may be available. *Hudson*, 522 U.S. at 102-03 ("Finally, it should be noted that some of the ills at which *Halper* was directed are addressed by other constitutional provisions."). Moreover, the Court's observation

that other constitutional protections are available applies equally to conditions of confinement which can be challenged under the due process clause in an action under 42 U.S.C. § 1983. *See infra* p. 11. Young's argument provides no basis for distinguishing *Hudson*, which controls this case.

Young's second argument to avoid *Hudson* is that its rejection of the "as applied" test is inconsistent with other decisions of the Court. According to Young, the Court always considers the constitutionality of statutes as applied. Resp. Br. at 17, 20-23. This argument is not well taken. Whether a statute is civil or criminal is a threshold question that determines the constitutional rules that the statute must satisfy. As the Court observed in *Hudson*, "*Halper* marked the first time we applied the Double Jeopardy Clause to a sanction without first determining that it was criminal in nature". *Hudson*, 522 U.S. at 100. The civil or criminal inquiry is a separate question from whether the statute satisfies applicable constitutional rules.

Young begins by discussing *Garner v. Jones*, 120 S. Ct. 1362 (2000), the single post-*Hudson* case he cites to support his argument. Resp. Br. at 16-17. *Garner* is inapposite. *Garner* did not involve the threshold question of whether the law was civil or criminal. The law at issue was plainly criminal in nature.

The question in *Garner* was whether a new criminal rule adopted by the Georgia parole board, that retroactively lengthened intervals between consideration for parole, violated the *ex post facto* clause by increasing the punishment for a crime after it was committed. The Court described the legal standard for such a determination as whether the law "creates a significant risk of prolonging respondent's incarceration". *Garner*, 120 S. Ct. at 1368. Because the Georgia parole board possessed significant discretion in considering parole both before and after adoption of the new rule, the Court determined that it was necessary to look at how the change in the law was being applied to determine whether it in fact "creates a

significant risk of prolonging respondent's incarceration". Thus, the particular inquiry and the controlling legal doctrine in *Garner* made the law's administration a necessary and relevant consideration. That is not the case here.

Young also supports this argument with long string-cites in footnotes and a brief discussion of cases such as *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Resp. Br. at 21-23 nn.11-18. With the exception of *United States v. Ward*, 448 U.S. 242 (1980), and *Allen v. Illinois*, 478 U.S. 364 (1986), none of these cases address the threshold question at issue in this case of whether the civil or criminal nature of a statute is determined on its face or "as applied". Instead, these decisions go to the subsequent question of whether a civil or criminal law is constitutional as applied. In *Ward*, the Court considered the civil or criminal nature of the statute involved. However, the Court examined the statute on its face, not "as applied". *Ward*, 448 U.S. at 249-50. Thus, *Ward* is consistent with the approach laid out in *Hudson*. *Allen* also does not support Young's argument. *See infra* p. 7.

In *Hudson*, this Court held that the civil or criminal nature of a law is determined on its face, not "as applied". The fact that the Court considers the application of statutes to determine the subsequent question of constitutionality in no way undercuts this Court's holding in *Hudson*.[1]

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[1] Moreover, as the State points out in its opening brief, even if "administrative application" were relevant to the question at hand, Young and the Ninth Circuit fundamentally distort the notion of an "as applied" challenge. Pet. Br. at 18 n.11. Young alleges that he has been subjected to punitive conditions of confinement at the Special Commitment Center (SCC). Such conditions are neither imposed by the terms of Washington's Statute nor within the exercise of discretion that the Statute would allow. Indeed, they would be directly contrary to the Statute's requirement that committed persons are entitled to "adequate care and individualized treatment". Wash. Rev. Code § 71.09.080(2); Pet. App. at 122a; *see United States v. Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561, 565 (1972)

Young's third argument to distinguish *Hudson* is that the Court always considers the law "as applied" when confinement is involved. The Ninth Circuit also purported to distinguish *Hudson* on this basis. *Young v. Weston*, 192 F.3d 870, 874 n.4 (9th Cir. 1999); Pet. App. at 7a n.4. In our opening brief we explained why the Ninth Circuit was in error. Pet. Br. at 19-23. Young's arguments are similarly flawed. Young offers four cases to support this argument.

Young first cites *Kansas v. Hendricks*, 521 U.S. 346 (1997), and claims that this Court upheld the Kansas sexually violent predator law "only after a careful analysis of the conditions of confinement". Resp. Br. at 15-16. This is not accurate. As we explained in our opening brief, both the majority and the dissent mentioned conditions of confinement including lack of treatment. However, the holding of the majority, and the conclusion of the dissent, focused on the Kansas statute on its face. *Hendricks*, 521 U.S. at 367, 368-69, 383-88; Pet. Br. at 21-22.

Young next discusses *Schall v. Martin*, 467 U.S. 253 (1984). *Schall* involved a due process challenge to a law authorizing pre-trial detention of accused juvenile delinquents. The issue in *Schall* was not the civil versus criminal character of the law. According to Young, the Court found it necessary to consider the conditions under which the juveniles were confined. Resp. Br. at 18. Contrary to Young's claim, although the majority opinion mentioned actual conditions in passing, its analysis focused on the language and operation of the law. *Id.* at 269-71. For example, the Court relied on the fact that the law strictly limited the period of confinement,

(discussing required nexus between an "as applied" challenge and the terms of the statute); *see also Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., dissenting) (An "as applied" challenge is one where "the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional").

provided for an expedited hearing, and prohibited incarceration of juveniles with adults. *Id. Schall* is consistent with *Hudson*.

Similarly, *Reno v. Flores*, 507 U.S. 292 (1993), provides no support for Young's argument. *Reno* also involved a Due Process challenge to an Immigration and Naturalization Service regulation governing the custody of juvenile aliens. Young claims the Court approved the regulation on its face, but only upon satisfying itself that the conditions of confinement were decent and humane. Resp. Br. at 18-19. In fact, the conditions of confinement were not before the Court because the parties entered into an agreement that settled the claims regarding conditions. This agreement could be enforced in district court. *Reno*, 507 U.S. at 301. Thus, the civil or criminal nature of the regulation did not turn on the conditions of confinement. Rather, if conditions were improper, the district court could order that the conditions be improved.

The last case Young discusses is *Allen v. Illinois*, which concerned a law authorizing the civil commitment of sexually dangerous persons. Young points to the phrase in the opinion it "might well be a different case" if petitioners had shown conditions of confinement essentially identical to that of felons. Resp. Br. at 20. This statement is clearly dicta and, even as dicta, it does not adopt the "as applied" test advocated by Young and the Ninth Circuit. What is significant is that the court did not remand for an evidentiary hearing. Instead, it looked to the requirement of the law that "sexually dangerous persons must not be treated like ordinary prisoners". *Allen*, 374 U.S. at 374.[2]

[2] Young also discusses a decision of the Court of Appeals for the Fourth Circuit, *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964). Resp. Br. at 19. *Sas* challenged a Maryland law establishing a procedure to commit certain convicted criminals to an institution for criminally mental and emotional defectives. Young points out that the Fourth Circuit remanded the case to consider deficiencies in staff, facilities, and finance. However, on remand, when the district court considered whether the law was civil or criminal in nature, it concluded that the law was civil and that the "answer to this question must be determined from the face of the

Finally, Young argues that *Hudson* doesn't apply because, as a matter of substantive due process, "no punishment is permissible under a civil commitment statute". Resp. Br. at 15. In making this argument, Young attempts to skip over the threshold question of whether the Statute is civil or criminal. However, the civil versus criminal inquiry is critical in determining the nature of Young's substantive due process rights and how they are vindicated. If the Statute is civil (as Young's very argument presumes), Young cannot be punished, but his substantive due process right is vindicated through an action under 42 U.S.C. § 1983 to ameliorate the punishment. The facial test of *Hudson* remains the proper analysis to determine whether the Statute is civil or criminal.

This case is controlled by *Hudson*. There is no basis to distinguish *Hudson* from the case at bar. Accordingly, the civil or criminal nature of Washington's Statute must be determined on the face of the law, not "as applied". When the proper standard is employed, "*Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses". *Young v. Weston*, 192 F.3d at 874.

C. A Facial Test, Not An "As Applied" Test, Appropriately Determines Whether The Legislature Has Enacted A Civil Or Criminal Remedy

Our opening brief explained why the holding in *Hudson* is sound, as applied to this case. First, and most important, the civil versus criminal review is a limitation on legislative power designed to preclude legislative bodies from enacting criminal laws without the attendant constitutional protections. Pet. Br. at 23-24. Only the legislative branch of government is empowered to authorize criminal punishment, and it may do so only by enacting laws. *Schick v. Reed*, 419 U.S. 256, 275

Act". *Sas v. Maryland*, 295 F. Supp. 389, 402 (D. Md. 1969). The staff and facilities issues noted by Young related to an equal protection claim, not the civil or criminal nature of the law. *Id.* at 415-16.

(1974) ("Prescribing punishment is a prerogative reserved for the lawmaking branch of government, the legislature."); *Dowling v. United States*, 473 U.S. 207, 214 (1985) (citing *United States v. Wiltberger*, 5 Wheat 76, 95 (for the "plain principle that the power of punishment is vested in the legislative, not in the judicial department")). As this is so, the appropriate focus for determining whether a law creates a civil or a criminal remedy is the law itself – its purpose and its effect – as expressed by the Legislature in the statute's provisions. Young does not respond to this point.

In this respect, as we explained in our opening brief, the facial approach adopted by *Hudson* is consistent with the language and purpose of the *ex post facto* clause. Pet. Br. at 26. In the context of determining whether a statute imposes a civil or criminal remedy, the *ex post facto* clause serves to check legislative prerogative. Pet. Br. at 26; *Miller v. Florida*, 482 U.S. 423, 429 (1987) ("the reason the Ex Post Facto Clauses were included in the Constitution was to assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legislation").

A second important reason for rejecting the Ninth Circuit's "as applied" test is that it is unworkable. Pet. Br. at 29-30. Since conditions of confinement can change over time, the result of the Ninth Circuit's "as applied" test is that the same law may be civil in one year when adequate treatment is being provided and criminal in another year when it is not. Young argues that this is not a problem because courts are able to distinguish between passing and pervasive unconstitutionality. Resp. Br. at 36. This may be true, but it misses the point, and it does not resolve the workability problems with the "as applied" test. The question in this case is not whether the Statute is constitutional. The question is whether the Statute imposes a civil remedy or a criminal punishment. This threshold question requires a consistent answer, else the constitutional requirements applicable to the

law, including several with a trial or pre-trial focus, will not be known until long after proceedings under the law are complete.

For example, our opening brief explained *Hudson's* rejection of the "as applied" test in favor of examining the law on its face is consistent with the historic purpose of double jeopardy as a pre-trial plea to prevent multiple prosecutions.[3] Pet. Br. at 25. The "as applied" approach allows multiple prosecutions because it is impossible to know how a sanction will be applied until the prosecution is successfully completed and a sanction is imposed. In response, Young argues that the double jeopardy clause prohibits multiple punishments as well as multiple prosecutions. Resp. Br. at 37-38. Young is correct that decisions of this Court hold that the double jeopardy clause prohibits multiple punishments.[4] However, Young's argument again misses the point. The most effective way to prohibit both multiple prosecutions and multiple punishments is to determine the civil or criminal nature of a law prior to the imposition of the sanction. *Hudson* achieves this result.

The Ninth Circuit's "as applied" test is unworkable in a second way. Under it, the constitutionality of procedures set out in the civil commitment law may vary depending on where a person is confined. An example illustrates this point. Assume the Legislature adopted a civil commitment law that provides for psychiatric examination of the person to be committed and requires adequate treatment. However, instead of one institution like the Special Commitment Center (SCC)

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[3] Of course, we do not suggest that the test used to determine whether a law is civil or criminal depends on the underlying constitutional provision at issue. *Hudson*, 522 U.S. at 112 (Souter, J., concurring) ("there is obvious sense in employing common criteria to point up the criminal nature of a statute for purposes of both the Fifth and Sixth Amendments"); *Ward*, 448 U.S. at 254 ("[I]t would be quite anomalous to hold that [a statute] created a criminal penalty for the purposes of the Self-Incrimination Clause but a civil penalty for all other purposes.").

[4] However, Justices Scalia and Thomas have concluded that "the Double Jeopardy Clause prohibits successive prosecution, not successive punishment". *Hudson*, 522 U.S. at 106 (Scalia, J., concurring).

there are two. One institution provides adequate treatment, and the other does not. Under Young's "as applied" test, the same law would be civil with regard to one institution and criminal with regard to the other. There is no Fifth Amendment guarantee against self-incrimination under a civil commitment law. *Allen*, 478 U.S. at 368-70. Thus, the psychiatric examination would be constitutional if the person was committed to one institution, but improper if the person was committed to the other. Yet the statute and the Legislature's intent in adopting the law is exactly the same.

Our opening brief also explained the "as applied" test is inconsistent with the duty of the executive branch to faithfully execute the law. Pet. Br. at 27-29. Since *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), the Court has rejected the notion that the executive has the authority to suspend laws enacted by the legislative branch. In this case, the Washington Legislature has enacted a civil law that requires adequate care and individualized treatment. Wash. Rev. Code § 71.09.080(2); Pet. App. at 122a. If an executive agency fails to provide adequate treatment, it cannot transform the legislative intent to adopt this civil remedy into legislative intent to adopt a criminal penalty. Young attempts to distinguish *Kendall* by pointing out that the executive in this case makes no claim of the power to override the law. Resp. Br. at 39 n.26. This statement is true, but it also misses the point. The "as applied" test treats an executive agency's failure to execute the law as though it suspends or alters the intent of the legislative branch, even though the executive agency claims no such power.

II. Young's Recourse For Allegedly Punitive Conditions Of Confinement Is A Challenge To The Conditions, Not A Challenge To The Statute

Young has a remedy to cure inadequate treatment and other conditions of confinement. The remedy is an action under 42 U.S.C. § 1983. If Young succeeds, he would be

entitled to redress, including correction of the unlawful conditions.[5]

Based on what Young characterizes as "intransigence" on the part of SCC defendants in the *Turay* litigation, he argues that an action under 42 U.S.C. § 1983 is not an adequate remedy to rectify unconstitutional conditions of confinement. Resp. Br. at 57-59. Young's argument overlooks several important points.

First, it is not open to dispute in this Court that Young has been properly adjudged to be dangerous and to suffer from a mental abnormality that makes him likely to engage in predatory acts of sexual violence, if he is not constrained. The remedy Young seeks – release pursuant to habeas corpus – would entirely subordinate these constitutional and compelling bases justifying Young's commitment to the conditions of his confinement. Habeas corpus would provide a disproportionate response in circumstances such as these, where the alleged constitutional deficiencies do not taint the bases for

[5] Young argues as though it is established that he has been subjected to punitive conditions of confinement over a period of years. Pet. Br. at 14. However, highly selective findings cited by Young from other litigation do not demonstrate the pervasive or longstanding punitive conditions that Young asserts. *Young v. Weston*, 192 F.3d 874-75, 877; Pet. App. at 8a, 13a. Young also selectively refers to orders in *Turay v. Weston*. Resp. Br. at 6-10. Young's reliance on Turay as establishing punitive conditions of confinement is particularly misplaced. As noted by the district court judge in the *Turay* proceeding, *Turay* does not concern whether conditions of confinement at the SCC are punitive for purposes of the double jeopardy or *ex post facto* clauses. Lodging Of Petitioner (Lodging) at A (Findings Of Fact, Conclusions Of Law, And Order Re Motions Heard April 18-21, 2000 at 9). Turay challenged conditions of confinement at the SCC on several grounds – some similar to those alleged by Young. *Compare* JA at 64-65 to Pet. App. at 8a-11a. Notably, Turay failed in all but one of his allegations – i.e., that the SCC did not provide "access to mental health treatment that gives him a realistic opportunity to be cured or to improve the mental condition for which he was confined", the standard adopted by the district court for measuring the constitutional adequacy of this treatment.

confinement itself and where the alleged deficiencies are otherwise remediable.

Second, the premise of Young's argument seriously understates the magnitude of the effort necessary to comply with the myriad and detailed treatment directives of the 1994 *Turay* injunction and subsequent orders regarding the injunction. These orders and the series of special master's reports in *Turay* repeatedly recognize and reflect the complexity and inherent difficulty of the undertaking.[6] *See, e.g.*, JA at 114, 142; Supplemental Lodging Of Petitioner (Suppl. Lodging) at A (First, Preliminary Report of Special Master at 4). In the best of circumstances, it is a challenging and complex task to construct and successfully administer a model treatment program as ordered by the district court. It is made more difficult when a significant segment of the population resists treatment and works to disrupt treatment efforts. JA at 133; Suppl. Lodging at B (Second Report of Special Master at 3-4; Suppl. Lodging at C (Third Report of Special Master at 6).

Third, the premise of Young's argument gives short shrift to the substantial progress that the SCC has made toward completing compliance with the district court's *Turay* injunction. It is true that the pace of the SCC's efforts has not been uniformly acceptable to the district court, but the injunction proceeding has been characterized by progress and significant improvement in the treatment program at the SCC. JA at 113, 128, 142.[7] The district court has found that

[6] In a Supplemental Lodging Of Petitioner, the State has provided the orders of the district court on the *Turay* injunction, and the series of special master reports to the district court in that matter.

[7] Amicus NACDL errs in asserting that the federal district court judge "has been compelled to enter repeated contempt orders and sanctions on a multiplicity of occasions". Amicus Br. at 12. Prior to November 1999, the district court repeatedly denied requests by the *Turay* plaintiffs to hold the SCC defendants in contempt. Suppl. Lodging at S (Order On Turay's Motion For Further Injunctive Relief And For Order Holding Defendants In Contempt Of Court 11-21-95; Order On Plaintiff's Renewed

"conditions at SCC are far better than they were when the injunction was issued in 1994" and that compliance with the injunction is approaching being "substantially complete". Lodging at A (Findings Of Fact, Conclusions Of Law, And Order Re Motions Heard April 18-21, 2000 at 10).[8]

Finally, Young's argument overlooks the broad powers of the federal courts in remedying violations of federal rights. In *Hutto v. Finney*, 437 U.S. 678 (1979), the Court affirmed a district court's entry of broad injunctive relief in an action under 42 U.S.C. § 1983, challenging cruel and unusual conditions of confinement in an Arkansas prison. The Court explained that "[o]nce invoked, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Hutto*, 437 U.S. at 687 n.9 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)). As *Hutto* also makes clear, sanctions necessary to compel compliance with federal court orders are well within the arsenal of the federal judiciary. *Hutto*, 437 U.S. at 690.

Motion For Injunctive Relief And Contempt, And Defendants' Motion For Release From Injunction 4-2-96), T (Order On Plaintiff's Renewed Motion For Injunctive Relief And Contempt, And Defendants' Motion For Release From Injunction 2-4-97; Order On Plaintiff's Renewed Motion For Contempt And Defendants' Renewed Motion For Release From Injunction 10-1-97). Although the district court entered a contempt order in November 1999, it has seen fit to hold in abeyance the payment of sanctions pending further review. Lodging at A (Findings Of Fact, Conclusions Of Law, And Order Re Motions Heard April 18-21, 2000 at 19).

[8] Insofar as Young challenges the adequacy of mental health treatment at the SCC, this most recent finding of the district court would be relevant to his claim. Such a challenge by Young also would have to be considered in light of the fact that Young refuses to participate in treatment. Suppl. Lodging at Z (Order On 1996 Annual Review And Respondent's Motion To Dismiss at 3).

III. Young's Renewed Attacks On The Facial Validity Of The Statute And On His Commitment Are Barred And Fail

As noted at the outset of this brief, Young reasserts numerous claims rejected by the Ninth Circuit that he did not raise in a petition or cross petition in this Court. The Ninth Circuit rejected Young's facial attacks on the Statute, correctly holding that Washington's Statute, like its essentially identical counterpart sustained in *Kansas v. Hendricks*, 521 U.S. 346 (1997), is civil, and that, on its face, the Statute comports with substantive due process. *Young v. Weston*, 192 F.3d at 874, 876-77; Pet. App. at 7a, 12a-13a. Similarly, the Ninth Circuit properly rejected Young's challenges specific to his commitment. *Id.* at 1202; *Id.* at 13a.

Nevertheless, Young seeks to reassert these claims, and in doing so, he seeks to change the judgment entered by the Ninth Circuit. An argument that would modify the judgment below may not be presented unless a cross petition has been filed. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976). The Ninth Circuit's judgment remanded Young's "as applied" double jeopardy and *ex post facto* claims for an evidentiary hearing. Young's facial challenges would invalidate the Statute without need of an evidentiary hearing and modify the judgment below. Young's bald assertion that these claims are fairly subsumed in the question presented also is not meritorious. *Yee v. City of Escondido*, 503 U.S. 519, 537-38 (1992) (questions that are merely "related" or complimentary to the question presented are not "fairly included therein"). Although these issues are not properly before the Court, the State briefly responds to them, to avoid any implication of agreement with Young.

Young asserts that "legislative inaction" in remedying objectionable conditions of confinement at the SCC demonstrates the Legislature's punitive purpose in enacting Washington's Statute and negates the law's facial validity

under the double jeopardy and *ex post facto* clauses. Young's argument fails for several reasons, not the least of which is that the facial validity of Washington's law is not before the Court.

However, even if the claim were open, it would lack merit. The Washington Legislature clearly expressed its intent that Washington's law is civil and explicitly provided that persons committed under it are entitled to adequate care and individualized treatment. Wash. Rev. Code § 71.09.080(2); Pet. App. at 122a. Washington's highest court has construed the law as a civil statute primarily concerned with incapacitation and treatment. *In re the Personal Restraint Petition of Young*, 122 Wash. 2d 1, 22 (1993); Pet. App. at 42a. Further, as the following chart depicts, the Legislature has provided substantial and continuously increased funding to implement the Statute's provisions. It is unclear what more Young would require of the Legislature. Certainly, legislative bodies are ill-equipped to undertake the ongoing management of governmental programs and institutions.[9]

* * * * *

[9] Washington has a part-time Legislature. It convenes once a year with a regular session of 105 days in odd numbered years and 60 days in even numbered years. Wash. Const. art. II, § 12. Washington budgets on a biennial basis with a new biennium beginning on July 1st of each odd numbered year. The Legislature adopts a budget for the next ensuing biennium during its session in odd numbered years and makes necessary biennial budget adjustments in supplemental budgets. Wash. Rev. Code §§ 43.88.020(7), .080. The Legislature has made appropriations to implement the Statute in biennial and supplemental budgets. *See infra* at 17, notes 11-16.

FUNDING BY WASHINGTON LEGISLATURE FOR WASH. REV. CODE § 71.09	
BIENNIUM	APPROPRIATION
1989-91	1,614,000[10]
1991-93	4,908,000[11]
1993-95	6,053,000[12]
1995-97	7,576,000[13]
1997-99	15,253,000[14]
1999-01	22,835,000[15]

In addition, in its most recent session, the Legislature made a $14 million capital appropriation to begin construction of new SCC facilities, having a total projected cost of $64 million. 2000 Wash. Laws, 2d Sp. Sess., ch. 1, §§ 205(3), 1013.[16]

[10] 1990 Wash. Laws, 1st Ex. Sess., ch. 16, § 203(g), (h).

[11] 1991 Wash. Laws, 1st Sp. Sess., ch. 16, § 204(3).

[12] 1993 Wash. Laws, 1st Sp. Sess., ch. 24, § 204(3); 1995 Wash. Laws, 1st Sp. Sess., ch. 1, § 204(3).

[13] 1995 Wash. Laws, 2d Sp. Sess., ch. 18, § 204(3); 1996 Wash. Laws ch. 283, § 204(3); 1997 Wash. Laws, ch. 454, § 1104(3).

[14] 1997 Wash. Laws, ch. 149, § 204(3); 1998 Wash. Laws, ch. 346, § 204(3); 1999 Wash. Laws, ch. 309, § 1204(3).

[15] 1999 Wash. Laws, ch. 309, § 205(3); 2000 Wash. Laws, 2d Sp. Sess., ch. 1, § 205(3).

[16] In its first year of operation, 1991, the average monthly population of the SCC was 4 people. Its population has grown over time. In 1998, the last year for which actual average population figures are available, the SCC had an average monthly population of 59. It is estimated that the SCC will have an average monthly population of 108 in the year 2000. Wash. Legis. Budget Notes, 1997-99 Biennium, at 97 (June 1998); Wash. Legis. Budget Notes, 1999-00 Biennium, at 126 (June 1999).

Young next argues that legislative history demonstrates the punitive purpose of the Statute. However, for two reasons, this argument avails Young nothing. First, statutory construction is a component of the facial inquiry into whether a law is civil or criminal for purposes of the double jeopardy and *ex post facto* clauses. As is the case with Young's "legislative inaction" contention, the facial validity of Washington's law, and considerations legislative history that attend such an inquiry, are not before the Court.

However, even if they were, Young's proffered "legislative history" is of particularly dubious value, comprised of selected statements from a gubernatorial task force report and post-enactment legal commentary on Washington's Statute. Resp. Br. at 26-29. The Court has declined to accord any authoritative value to materials having significantly greater nexus to legislative action than the materials offered by Young. *Garcia v. United States*, 469 U.S. 70 (1984).[17]

Young also endeavors to resurrect a facial substantive due process challenge to Washington's Statute, contending that its definition of "mental abnormality" is deficient. This claim also was decided adversely to Young in the Ninth Circuit and drew no petition from Young. *Young v. Weston*, 192 F.3d at 876; Pet. App. at 12a. However, even if the question were before the Court, Washington's definition of mental abnormality is indistinguishable from the definition of "mental abnormality" sustained against attack on substantive due process grounds in *Hendricks*.[18]

---

[17] Young also asserts that the review procedures of the Statute are a sham. Resp. Br. at 54, 56. His claim is not borne out by the review process as reflected in his case. Suppl. Lodging at Z (Order On 1996 Annual Review And Respondent's Motion To Dismiss).

[18] Wash. Rev. Code § 71.09.020 defines "mental abnormality' as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others". Pet. App. at 104a. The Kansas statute sustained in *Hendricks* defined "mental abnormality" as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others". *Hendricks*, 521 U.S. at 352.

Finally, Young challenges one of the specific diagnoses (severe paraphilia not otherwise specified, rape) used as evidence to support the jury's unanimous determination that he suffers from a mental abnormality. Resp. Br. at 44. As with Young's renewed facial challenges to the Statute, this claim also was rejected by the Ninth Circuit and is not properly before the Court. In addition, on Young's direct appeal from his commitment, the Washington Supreme Court recounts at length and appropriately scrutinizes the expert testimony establishing that Young suffers from a mental abnormality. *In re Young*, 122 Wash. 2d at 15-16, 29-30; Pet. App. at 34a-35a, 50a-52a.

CONCLUSION

The Ninth Circuit reversed the decision of the district court in part and remanded for an evidentiary hearing. This portion of the Court of Appeals decision is in error. It should be reversed, and the respondent's Petition for Writ Of Habeas Corpus should be dismissed.

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August 7, 2000

FOR ARGUMENT (14)

No. 99-1185

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IN THE
SUPREME COURT OF THE UNITED STATES

MARK SELING,
Superintendent, Special Commitment Center,
Petitioner,

DISTRIBUTED

v.

OCT 1 ' 2000

ANDRE BRIGHAM YOUNG,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

SUPPLEMENTAL BRIEF OF RESPONDENT

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Kansas Court Reviewed Application of 'Predator' Law; Failure to Prove Lack of Volitional Control Rendered Commitment Unconstitutional

Mr. Young is filing this supplemental brief to call to the Court's attention a new case which highlights issues presented in this case. The case was filed after Mr. Young's brief was filed herein.

The Kansas Supreme Court, in In the Matter of the Care and Treatment of Michael T. Crane, 7 P.3d 285 (No. 82,080, July 14, 2000), specifically reviewed how the Kansas "predator" law was being applied. It ruled that a commitment under the Sexually Violent Predator Act, K.S.A. 59-29a01 et seq., is unconstitutional absent a finding that the defendant suffers from a volitional impairment rendering him or her dangerous beyond his or her control. 7 P. 3d at 290. The Court relied on the majority's statements in Kansas v. Hendricks, 521 U.S. 346 (1997), limiting civil commitment to those "who suffer from a volitional impairment rendering them dangerous beyond their control." 521 U.S. at 358. 7 P. 3d at 288.

The Court did not rule on the ex post facto claim raised by Mr. Crane, but found that "the question is open" based on Justice Kennedy's concurring opinion and the dissenting opinion in Hendricks. 7 P.3d at 291. The Court did note that in a previous case it had "declared that commitment under the Act was not

criminal or punitive and, therefore, does not violate the prohibition of ex post facto lawmaking", relying on Hendricks, 7 P.3d at 292. But it implied that applying the law to Mr. Crane, without a showing of absence of volitional control, might implicate a deterrent, or punitive purpose, and therefore the question of ex post facto was open.

The decision in Crane emphasizes the necessity of examining the actual implementation of the statute, and the importance of careful application of the statute on the issue of volitional control. It also underscores the significance of Justice Kennedy's concerns in Hendricks and supports the decision of the Court of Appeals in Mr. Young's case to remand for a hearing on the punitive nature of the law as applied to Mr. Young.

Conclusion

Mr. Young urges this Court to affirm the decision of the Court of Appeals.

Respectfully submitted this 12th day of October, 2000.

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(5)

No. 99-1185

IN THE
Supreme Court of the United States

MARK SELING, Superintendent
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v.

ANDRE BRIGHAM YOUNG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF KANSAS AND THE *AMICI* STATES IN SUPPORT OF WASHINGTON

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QUESTION PRESENTED

Whether a civil commitment statute that is constitutional on its face can violate double jeopardy or *ex post facto* prohibitions "as applied" to a particular individual?

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INTERESTS OF THE *AMICI CURIAE*

Kansas and the Amici States submit this brief in support of petitioner, the State of Washington, and respectfully request that this Court reverse the erroneous decision of the Ninth Circuit holding that respondent may assert "as applied" double jeopardy and *ex post facto* challenges to the Washington Sexually Violent Predator Act. Pet. App. 1a - 13a.

Kansas and many other *Amici* States have virtually identical statutes that permit, pursuant to strict procedural requirements, the civil commitment of certain sexually violent predators. In a direct facial challenge to the Kansas Sexually Violent Predator Act—which was modeled directly on the Washington statute at issue in this case—this Court held that such laws do not violate either the double jeopardy or *ex post facto* prohibitions of the United States Constitution. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

In part as a result of this Court's ruling in *Kansas v. Hendricks*, fourteen states in addition to Kansas and Washington currently have a sexually violent predator act.[1] These sixteen states, and those that anticipate such legislation, therefore have a shared interest in preserving the integrity of these laws. Moreover, the Ninth Circuit's decision permitting resort to federal *habeas corpus* as a way to challenge treatment programs and conditions of confinement logically could be extended to *any* civil commitment statute. Such a result would

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[1] Those states are: Arizona (Ariz. Rev. Stat. §§ 36-3701 - 36-3716), California (Cal. Welf. & Inst. Code § 6600), Florida (Fla. Stat. Ann. §§ 394.910 - 394.931), Illinois (725 Ill. Comp. Stat. Ann. 207), Iowa (Iowa Code § 229A), Massachusetts (M.G.L. ch. 6, §§ 178C - 178P), Minnesota (Minn. Stat. §§ 253B.185 & 253B.02, subds. 18b & 18c), Missouri (Mo. Rev. Stat. § 632.480), New Jersey (N.J. Rev. Stat. § 30:4-27.26), North Dakota (N.D. Cent. Code § 25-03.3), South Carolina (S.C. Code Ann. § 44-48-10), Texas (Tex. Health & Safety Code Ann. § 841), Virginia (§§ 37.1-70.1, *et seq.*, Code of Virginia (1950) *as amended*), and Wisconsin (Wis. Stat. ch. 980).

directly and significantly impact all fifty states, as well as the federal courts.

SUMMARY OF ARGUMENT

The Ninth Circuit erroneously refused to follow this Court's decision in *Kansas v. Hendricks*, 521 U.S. 346, which expressly rejected double jeopardy and *ex post facto* challenges to a sexually violent predator act indistinguishable from the Washington statute at issue in this case. Although recognizing that "*Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses," Pet. App. 7a, the Ninth Circuit erroneously and improvidently created a novel "as applied" double jeopardy and *ex post facto* analysis. *See id.* (opining that "*Hendricks* does not preclude the possibility that the Washington statute, as applied, is punitive").

The Ninth Circuit's decision ignores and/or misapprehends this Court's two-step "punishment" analysis for double jeopardy and *ex post facto* claims. The "threshold question," *Hudson v. United States*, 522 U.S. 93, 101 (1997), whether the Washington statute actually imposes "criminal punishment"—which the Ninth Circuit passed over—is critical to the respondent's challenges in this case. Indeed, the Court made clear in *Hendricks* that"[o]ur conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims." 521 U.S. at 369.

In this context, the Court has made clear that, when a law purports to be civil on its face, a presumption arises that the statute is civil and thus not punitive. *See Kansas v. Hendricks*, 521 U.S. at 361. That presumption can be overcome *only if* the challenging party demonstrates "by the clearest proof" that the statutory scheme is "so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Hudson v. United States*, 522 U.S. at

99-100 (internal citations omitted). To that end, the factors enunciated in *Kennedy v. Mendoza -Martinez*, 372 U.S. 144, 168-69 (1963), "provide useful guideposts." *Hudson*, 522 U.S. at 99. However, in *Hudson v. United States* the Court emphasized that the *Kennedy* factors "'must be considered in relation to the statute on its face.'" *Hudson*, 522 U.S. at 100 (quoting *Kennedy v. Mendoza -Martinez*, 372 U.S. at 169).

Thus, the Ninth Circuit's first error was to skip the "threshold question" whether the Washington statute imposes "criminal punishment" and to ignore the Court's explicit instruction in *Hudson* that a statute's "effect"—for purposes of making that threshold determination—is to be considered in relation to the statute *on its face*. *Hudson*, 522 U.S. at 100. Moreover, *Kansas v. Hendricks*, 521 U.S. 346, upholding a virtually identical statute against double jeopardy and *ex post facto* challenges, is to the same effect as *Hudson* on this determinative point. In essence, the Ninth Circuit's decision in this case resurrects the approach of *United States v. Halper*, 490 U.S. 435 (1989), which this Court expressly overruled in *Hudson v. United States*, 522 U.S. at 101 (footnote omitted) ("We believe that *Halper*'s deviation from longstanding double jeopardy principles was ill-considered").

The Ninth Circuit's second error was to misapprehend the Court's passing references in *Kansas v. Hendricks* to the alleged actual conditions of Hendricks' commitment and the treatment he was receiving. Contrary to the Ninth Circuit's decision, the Court did not in *Hendricks* "turn repeatedly to the question whether the conditions of Hendricks' confinement rendered the Kansas statute punitive," Pet. App. 7a, nor does *Hendricks* "dictate[] . . . [that courts] look to the conditions of . . . confinement when" evaluating double jeopardy and *ex post facto* claims. *Id.* Rather, although Hendricks himself repeatedly had attempted to transform his challenge to the Kansas statute into a *habeas*-like proceeding, this Court limited its analysis to consideration of the statute on its face in accord

with the two-step approach articulated in *Hudson* and numerous other cases. *See* 521 U.S. at 361-67 (discussing at length various provisions of the Kansas Sexually Violent Predator Act *itself*, the Act's legislative history, and the Kansas Supreme Court's decision below, in assessing whether there was the "clearest proof" that the Act was actually punitive or criminal in effect).

Only in the penultimate paragraph of its analysis in *Hendricks* did the Court mention the Attorney General's representation at oral argument that Hendricks was receiving treatment. 521 U.S. at 368. And, only in a footnote at that point did the Court even mention the state *habeas* proceeding Hendricks had filed while the appeal of his commitment was pending. *Id.* at 368 n.5. Thus, *nothing* in the Court's opinion in *Kansas v. Hendricks* suggests, much less "dictates", that federal courts should conduct evidentiary hearings on federal *habeas corpus* applications to determine whether a civil commitment statute—admittedly constitutional on its face—violates constitutional double jeopardy and *ex post facto* prohibitions "as applied."

Finally, even were respondent not receiving appropriate treatment under Washington's program, the only potentially proper federal remedy would be a section 1983 suit seeking to enforce compliance with constitutional requirements. The Court repeatedly has made clear that the *habeas corpus* statute, 28 U.S.C. § 2254, and 42 U.S.C. § 1983 operate in different spheres. *Preiser v. Rodriguez*, 411 U.S. 475, 484-86 (1973); *Heck v. Humphrey*, 512 U.S. 477, 487 (1994); *Edwards v. Balisok*, 520 U.S. 641, 648 (1997). These two federal statutes are not "fungible remedies for constitutional violations." *Allen v. McCurry*, 449 U.S. 90, 104 n.24 (1980). If there is a problem with respondent's treatment, his potential federal redress is a section 1983 suit seeking correction of constitutional deficiencies in the Washington program, not release from custody under section 2254.

For these reasons, the Ninth Circuit's decision should be reversed.

ARGUMENT

I. THIS COURT'S DECISIONS IN *KANSAS v. HENDRICKS*, 521 U.S. 346 (1997), AND *HUDSON v. UNITED STATES*, 522 U.S. 93 (1997), MAKE CLEAR THAT THERE CAN BE NO "AS APPLIED" DOUBLE JEOPARDY AND *EX POST FACTO* CHALLENGES TO FACIALLY VALID CIVIL COMMITMENT STATUTES

The Ninth Circuit erred in at least two critical respects. First, the Ninth Circuit's decision ignores and/or misapprehends this Court's two-step "punishment" analysis for double jeopardy and *ex post facto* claims. The "threshold question," *Hudson v. United States*, 522 U.S. at 101, whether the Washington statute actually imposes "criminal punishment"—which the Ninth Circuit passed over—is critical to the respondent's challenges in this case. Indeed, the Court made clear in *Hendricks* that"[o]ur conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims." 521 U.S. at 369.

Second, the Ninth Circuit erred by not recognizing that the threshold "criminal punishment" analysis is limited to an assessment of the relevant statute "'on its face.'" *Hudson v. United States*, 522 U.S. at 100 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963)). In a related vein, the Ninth Circuit also erred in reading this Court's decision in *Kansas v. Hendricks* to "dictate" that courts look to the actual conditions of confinement in assessing whether a facially valid civil commitment statute is nonetheless criminal punishment "as applied." Pet. App. 7a. This Court's decision in *Hendricks* did not employ such an approach, which is logically inconsistent with the double jeopardy/*ex post facto* analytical framework

the Court applied in *Hendricks* and reiterated in *Hudson* (while expressly overruling *United States v. Halper*, 490 U.S. 435, which the Ninth Circuit effectively attempted to resurrect in this case).

A. Double Jeopardy And *Ex Post Facto* Challenges To A Purportedly Civil Statute Must Be Evaluated By Considering The Statute On Its Face

In *Kansas v. Hendricks*, 521 U.S. 346, and *Hudson v. United States*, 522 U.S. 93, this Court clearly articulated the proper analysis to determine whether a purportedly civil law implicates constitutional double jeopardy or *ex post facto* prohibitions. In *Hendricks*, the Court stated the basic analytical framework as follows:

> The categorization of a particular proceeding as civil or criminal "is first of all a question of statutory construction." We must initially ascertain whether the legislature meant the statute to establish "civil" proceedings. If so, we ordinarily defer to the legislature's stated intent. * * * Although we recognize that a "civil label is not always dispositive," we will reject the legislature's manifest intent only where a party challenging the statute provides the "clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil."

521 U.S. at 361 (internal citations omitted). Likewise, in *Hudson*, the Court articulated the analysis as follows:

> Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." Even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in

> purpose or effect" as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty." In making this latter determination, the factors listed in *Kennedy v. Mendoza-Martinez* provide useful guideposts . . . . It is important to note, however, that "these factors must be considered in relation to the statute on its face," and "only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.

522 U.S. at 99-100 (internal citations omitted).

The Court in *Hudson* then went on to disavow the analysis it applied in *United States v. Halper*, 490 U.S. 435, observing that

> [t]he analysis applied by the *Halper* Court deviated from our traditional double jeopardy doctrine in two key respects. First, the *Halper* Court bypassed the threshold question: whether the successive punishment at issue is a "criminal" punishment. * * * The second significant departure in *Halper* was the Court's decision to "asses[s] the character of the actual sanctions imposed," rather than, as *Kennedy* demanded, evaluating the "statute on its face" to determine whether it provided for what amounted to a criminal sanction.

522 U.S. at 101 (internal citations omitted). The Ninth Circuit's decision in this case is effectively an attempt to resurrect the discarded *Halper* double jeopardy analysis.

It is clear that, initially, a court must inquire whether the legislature, when enacting a particular law, purported to create either a civil or a criminal statute. *Hudson v. United States*, 522 U.S. at 99. If the law purports to be civil on its face, a presumption arises that the statute is civil. *Kansas v. Hendricks* 521 U.S. at 361. That presumption can be overcome only if the challenging party demonstrates "by the clearest proof" that the statutory scheme is "so punitive either

in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 99-100 (internal citations omitted).

In assessing whether the "clearest proof" exists, the factors enunciated in *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-69,[2] "provide useful guideposts." *Hudson*, 522 U.S. at 99. However, this Court has made it perfectly clear that the *Kennedy* factors "must be considered in relation to the statute on its face." *Hudson*, 522 U.S. at 100; *id.* at 101. It is from this latter, and highly significant, principle that the Ninth Circuit departed.

Given the concerns over a "wide variety of novel double jeopardy claims" that arose following the Court's decision in *United States v. Halper*, 490 U.S. 435, the Court revisited and ultimately rejected the *Halper* analysis in *Hudson v. United States*, 522 U.S. 93. Indeed, the Court expressly rejected *United States v. Halper* as "ill-considered" and "unworkable." *Hudson*, 522 U.S. at 101-02. In finding that the *Halper* decision had improperly "elevated" a single *Kennedy* factor, the Court reaffirmed the import of the *Kennedy* decision that no one factor should be considered controlling. 522 U.S. at 101.

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[2] The *Kennedy v. Mendoza-Martinez*, factors are as follows:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [all of which are] relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute *on its face*.

372 U.S. at 168-69. (footnotes omitted) (emphasis added).

Perhaps most importantly for this case, however, was the Court's conclusion that *Halper* had erroneously, and contrary to the command of *Kennedy*, "assessed the character of the actual sanctions imposed." *Id.* at 101-02. In this case, the Ninth Circuit effectively ignored the Court's rejection of *Halper* and indeed attempted to resurrect the *Halper* approach.

In short, this Court has unequivocally announced that for double jeopardy and *ex post facto* purposes, consideration of a statute's "effect" in making the threshold "criminal punishment" determination is limited to an analysis of the statute on its face. *Id.* at 100. An "as applied" approach, as utilized by the Ninth Circuit in this case, simply does not exist under this Court's precedents and is unworkable, as the Court explained when it overruled *Halper*.

Thus, in holding that the conditions of respondent's confinement may render Washington's commitment statute punitive as applied to respondent, the Ninth Circuit resurrected a previously rejected, ill-advised and unworkable constitutional challenge: an "as applied" double jeopardy/*ex post facto* claim.[3] The Ninth Circuit's approach in this case flies in the face of this Court's recent, well-established precedents and, if permitted to stand, will render meaningless the Court's requirement that such challenges be considered "in relation to the statute on its face." *Hudson*, 522 U.S. at 100. Indeed, the Ninth Circuit's decision fundamentally misapprehends the nature of the constitutional double jeopardy and *ex post facto* prohibitions and constitutes a marked detour from this Court's recent cases.

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[3] This Court made clear in *Kansas v. Hendricks* that, at least in the civil commitment context, double jeopardy and *ex post facto* claims are congruent. In particular, the Court held "that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive. Our conclusion that the Act is nonpunitive thus removes an *essential prerequisite* for *both Hendricks*' double jeopardy and *ex post facto* claims." 521 U.S. at 369 (emphasis added).

B. In *Kansas v. Hendricks*, 521 U.S. 346 (1997), This Court Limited Its Evaluation Of The Double Jeopardy And *Ex Post Facto* Challenges To The Kansas Statute On Its Face

The Ninth Circuit relies primarily on the Court's decision in *Kansas v. Hendricks* for the position that an "as applied" analysis is appropriate for double jeopardy and *ex post facto* purposes. In an attempt to justify its novel and improvident analysis, the Ninth Circuit opined (incorrectly) that the Court in *Hendricks* "turn[ed] repeatedly to the question whether the conditions of Hendricks' confinement rendered the Kansas statute punitive." Pet. App. 7a. The Ninth Circuit failed in this respect to read the *Hendricks* opinion carefully and to appreciate the context in which this Court made passing reference to Hendricks' conditions of confinement.

In *Kansas v. Hendricks*, the Court began its analysis of the "punishment" issue by noting that "[w]e granted Hendricks' cross-petition to determine whether the Act violates the Constitution's double jeopardy prohibition or its ban on *ex post facto* lawmaking." 521 U.S. at 360-61. The Court explained that the "thrust of Hendricks' argument is that the Act establishes criminal proceedings; hence confinement under it necessarily constitutes punishment." *Id.* at 361. In rejecting that argument, the Court began its analysis by observing that the determination whether "a particular proceeding is civil or criminal 'is first of all a question of statutory construction.'" *Id.* (quoting *Allen v. Illinois*, 478 U.S. 364, 368 (1986)). After observing that "nothing on the face of the [Kansas] statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm," 521 U.S. at 361, the Court emphasized that the key issue is whether "'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

The Court then proceeded to analyze the Kansas statute with repeated reference to the statute's purpose and the Kansas Legislature's intent, as derived from the provisions of the statute itself. 521 U.S. at 361-67. In so doing, the Court discussed the purposes of the statute, *id.* at 361-63, the nature and length of Hendricks' potential detention under the statute, *id.* at 363-64, the procedural safeguards included in the statute, *id.* at 364-65, and the statute's requirement of treatment. *Id.* at 365-67. Only in the penultimate paragraph of this section of the opinion did the Court even mention the actual conditions of Hendricks' confinement or the treatment program. And the Court's passing references are in essence an aside indicating that the implementation of the statute was consistent with the facial analysis.[4] The Court made no suggestion that the implementation actually affected the double jeopardy and *ex post facto* analysis.[5]

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[4] While his appeal of his commitment was pending in state court, Hendricks had filed a state *habeas* proceeding, arguing that he should be released from the sexually violent predator program because he was not receiving adequate treatment. He lost in that proceeding and then attempted to make that proceeding part of the record in his appeal of the commitment decision in the Supreme Court of Kansas. After that court denied his request to make that proceeding part of the record on appeal, Hendricks continued to attempt to use testimony from that proceeding in his appeal to this Court. Thus, although the Court referred in passing to the facts developed in the state *habeas* proceeding, it is clear that those proceedings were not part of the official record before this Court when it decided *Kansas v. Hendricks*. *See* 521 U.S. 346, 368 n.5; *id.* at 392 (Breyer, J., dissenting) ("The [state *habeas*] proceeding is thus not part of the record, and cannot properly be considered by this Court.").

[5] Indeed, the Court held the Kansas law to be a civil commitment scheme not subject to double jeopardy and *ex post facto* facial challenges even though the treatment program in Kansas was not fully implemented when Hendricks was committed under the statute. *Kansas v. Hendricks*, 521 U.S. at 367-68 ("Although the treatment program initially offered Hendricks may have seemed somewhat meager, it must be remembered that he was the first person committed under the Act"); *see also*

Thus, although the Court mentioned—in a very general way—the conditions under which Hendricks was confined and the treatment he was receiving, the Court's focus was a facial analysis of the Kansas statute. The Kansas Legislature's intent was the overriding concern. *Hendricks*, 521 U.S. at 362-369. In particular, the Court maintained that the "effect" of the statutory scheme is reviewed simply to determine whether a rejection of the "legislature's manifest *intent*" to deem a law civil is warranted. *Id.* at 361 (emphasis added). The only inquiry for double jeopardy and *ex post facto* purposes, therefore, in accordance with both *Hendricks* and *Hudson*, is whether Washington's Sexually Violent Predator law *on its face* is so punitive in purpose or effect that it must be considered "punishment" for constitutional purposes.

For all practical purposes the Ninth Circuit has carved out an exception to the proper facial analysis of a statute by attributing meaning to *Hendricks* that is simply not there. Contrary to the Ninth Circuit's assertion in this case, *Hendricks* did not leave open the possibility of an "as applied" approach. Quite the opposite. *Hendricks* clearly disposes of the issue, given that the only reasonable interpretation is that conditions of confinement were addressed in passing and solely within the context of evaluating legislative intent. Consequently, there is no support in this Court's precedents for an "as applied" approach to double jeopardy and *ex post facto* challenges to a statute.

Youngberg v. Romeo, 457 U.S. 307, 317 (1982) (wide latitude for treatment regimes). Even Justice Breyer who, in dissent, would have found the Kansas law punitive, argued that the Kansas statute was distinguishable from any other state statute, including the Washington law at issue in this case. *Kansas v. Hendricks*, 521 U.S. at 388-89 (Breyer, J., dissenting).

II. *HABEAS CORPUS* RELIEF IS NOT PROPER IN THIS CONTEXT

Equally flawed was the Ninth Circuit's decision to address respondent's claims under the *habeas corpus* statute, 28 U.S.C. § 2254. Because respondent's claims only challenge the conditions of his confinement and his treatment program, the appropriate federal vehicle—if any—for respondent's claims is a suit under 42 U.S.C. § 1983. *See Preiser v. Rodriguez*, 411 U.S. at 484-86; *Heck v. Humphrey*, 512 U.S. at 487; *Edwards v. Balisok*, 520 U.S. at 648. Respondent's claims in this case do not undermine the validity of his initial commitment nor the procedures used (this Court's decision in *Kansas v. Hendricks* largely having precluded such challenges). Federal *habeas* actions and section 1983 suits are not "fungible remedies for constitutional violations." *Allen v. McCurry*, 449 U.S. 90, 104 n.24. Thus, whatever federal avenue may be available for respondent to raise his challenges to the conditions of his confinement and his treatment program, it is not a *habeas corpus* suit under 28 U.S.C. § 2254.

Respondent has the opportunity to demonstrate in a section 1983 suit that his treatment is constitutionally deficient.[6] In *Heck v. Humphrey*, this Court sought to harmonize the more "general" section 1983 with the more "specific" federal *habeas corpus* statute. *Heck* held that a prisoner may not bring a section 1983 action seeking damages for "actions whose unlawfulness would render a conviction or sentence invalid" without first establishing the invalidity of that conviction or sentence under habeas. 512 U.S. at 486-87 (footnote omitted).

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[6] It is the Fourteenth Amendment's guarantee of due process, not constitutional double jeopardy and *ex post facto* prohibitions, that governs the rights of a civilly committed individual to "constitutionally required conditions of confinement." *Youngberg v. Romeo*, 457 U.S. at 315; *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Jones v. United States*, 463 U.S. 354, 383 (1983).

Thus, persons who challenge the validity of their underlying conviction or the duration of their confinement must pursue the exclusive and specific remedy of a writ of *habeas corpus*. *Bressman v. Farrier*, 498 U.S. 1126, 1127 (1991); *Preiser v. Rodriguez*, 411 U.S. 475, 489-90.

But the converse is also true. Persons that challenge only the conditions of their confinement, but not the fact or duration of their confinement, cannot obtain *habeas corpus* relief, *i.e.*, release from custody. When an individual does not challenge the underlying commitment, but instead only the conditions of his civil confinement, the appropriate federal method for considering constitutional claims is under section 1983, not *habeas corpus*. Thus, in this case, respondent's "remedy for these alleged unconstitutional conditions is not a release from confinement." *In re Detention of Turay*, 986 P.2d 790, 812, *as amended in denial of reh'g* (Wash. 1999).

The appropriate remedy in this case, if a remedy is constitutionally required, is to correct or remove the offending condition rather than release respondent. Respondent does not attack his underlying commitment and presumably would lack any basis to challenge his confinement if the alleged "punitive" conditions were removed or modified to comport with constitutional requirements. Because a judgment "in [respondent's] favor would not demonstrate the invalidity of his confinement," his claims are outside the scope of *habeas corpus*. *Heck v. Humphrey*, 512 U.S. at 499 n.4 (Souter, J., concurring).

Although respondent may well desire release from confinement–the essence of *habeas corpus*, *see Preiser v. Rodriguez*, 411 U.S. at 484–his claims clearly relate only to Washington's allegedly unconstitutional treatment program and conditions of confinement. Consequently, his claims are not properly cognizable under federal *habeas corpus*. To hold otherwise would be to expand federal *habeas corpus* beyond its intended scope. *Cf. Heck v. Humphrey*, 512 U.S. at 491

(Thomas, J., concurring). Thus, any challenge to the implementation of the facially valid Washington statute must be brought as an action seeking to compel the State to comply with constitutional treatment requirements. Questions regarding the nature of the Washington treatment program do not form a legal basis for seeking to declare the law unconstitutional.[7]

Thus, if respondent's treatment program is inadequate, his potential federal remedy is to file a section 1983 suit seeking to compel compliance with any federal constitutional requirements. It does not follow that concerns or questions about a predator's treatment conditions or program must lead to his release. A remedy of that sort is far too broad and disproportionate to the nature of the claim. In appropriate cases, 42 U.S.C. § 1983 may provide the necessary federal vehicle for someone such as respondent to raise inadequate treatment or improper condition claims.

Moreover, such challenges may be made not only by sexual predators but by *any* person who has been involuntarily confined through some sort of civil process.[8] Once *habeas corpus* relief—release from custody—is divorced from the context in which it is appropriate, there will be any number of

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[7] Like the Kansas statute upheld in *Hendricks*, the Washington law expressly requires and emphasizes that "any person committed pursuant to this chapter has the right to adequate care and individualized treatment." Wash. Rev. Code § 71.09.080(2). Pet. App. 122a.

[8] *See, e.g., In re: Indefinite Detention Cases*, No. CV 98-674 TJH(JWJX), 2000 WL 95306, at *3-4 (C.D. Cal. Jan. 27, 2000) (addressing, in the deportation context, the constitutional involuntary commitment principles discussed in *Foucha v. Louisiana*, 504 U.S. 71 (1992)). Given the Ninth Circuit's expansive use of federal *habeas corpus* in this case, it is reasonable to conclude that those subject to deportation may look to federal *habeas corpus* in an effort to seek release from custody pending repatriation, even though their only complaints may concern their conditions of confinement.

persons who may seek to invoke *habeas corpus* as a remedy against allegedly improper *conditions* of confinement. Ultimately, the impropriety of *habeas corpus* relief to remedy allegedly improper conditions of confinement further demonstrates that the Ninth Circuit's "as applied" theory of double jeopardy and *ex post facto* challenges does not pass muster.

CONCLUSION

This Court should reverse the Ninth Circuit's decision.

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In the Supreme Court of the United States

MARK SELING, SUPERINTENDENT,
SPECIAL COMMITMENT CENTER,

PETITIONER,

v.

ANDRE BRIGHAM YOUNG,

RESPONDENT.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CALIFORNIA ATASCADERO STATE HOSPITAL SECTION 6600 CIVIL COMMITTEES IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICUS CURIAE*

Amicus Curiae is a group of approximately 300 men who are currently confined at the Atascadero State Hospital pursuant to California's Sexually Violent Predator Act (*see* CAL. WELF. & INST. CODE § 6600 *et seq.*) in a pending class action brought pursuant to 42 U.S.C. Section 1983.[1] Like Mr. Andre Brigham Young, *Amicus* alleges, *inter alia*, that

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party has authorized this brief, in whole or in part, and that no person or entity, other than *Amicus* or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters have been filed with the Clerk of the Court confirming that all parties have consented to the submission of this *Amicus* brief.

the conditions of confinement at Atascadero State Hospital violate three separate provisions of the United States Constitution: substantive due process, the guarantee against double jeopardy, and the Ex Post Facto Clause.

This Court's determination of the constitutional questions at issue here is directly relevant to the ultimate resolution of *Amicus'* currently pending claims because California's Sexually Violent Predator Act tracks the language of the Washington statute's definition of "mental abnormality."

Amicus submits this brief in support of Respondent, Mr. Young, and respectfully urges this Court to clarify that, as the term "mental abnormality" was defined in *Hendricks*, before indefinite involuntary civil commitment can be justified, an individual must be shown to be dangerous and to lack volitional control over his actions. *Amicus* further urges the Court to affirm the holding of the Ninth Circuit's decision in this case.

SUMMARY OF ARGUMENT

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), this Court reaffirmed that substantive due process requires proof of dangerousness, coupled with proof of some additional factor, such as "mental illness" or "mental abnormality," before indefinite involuntary civil detention can be justified. While it rejected the argument that a finding of "mental illness" was a necessary constitutional predicate for civil commitment, the Court concluded that a finding of "mental abnormality" under the statute in question passed constitutional muster because it limited confinement to "those who are unable to control their dangerousness." *Id.* at 358.

While the Court noted that the task of defining legally significant terms of a medical nature is one that is traditionally left to legislatures, nothing in the Court's opinion suggests that it intended to abandon constitutional limits on what legislatures may adopt for their definitions of

those terms. To the contrary, the majority opinion in *Hendricks* stressed the significance of the lack of volitional control standard no less than ten distinct times. Justice Kennedy's concurring opinion also underscored the importance of the constitutional content of the "mental abnormality" requirement. *Id.* at 373. Even Justice Breyer, though dissenting from other parts of the Court's opinion, joined the majority's rejection of Hendricks' substantive due process claim on the basis that Hendricks suffered from a "classic case of irresistible impulse" such that he could not control his urge to molest children. *Id.* at 376 (Breyer, J., dissenting).

To the extent that *Hendricks* could be viewed as not expressly holding that lack of volitional control is a constitutionally required predicate to civil commitment, *Amicus* respectfully submits that the Court should take this opportunity to do so now. The constitutional significance of the lack of volitional control requirement cannot be overstated. Without it, states are unconstrained and free to impose indefinite involuntary civil commitment upon proof of future dangerousness alone. Such a standard fails to comport with substantive due process and contravenes the express holdings of this Court. Additionally, absent proof of a volitional impairment, civil confinement becomes a mechanism for retribution and general deterrence, rendering it a punishment in violation of the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution.

The acts of the state legislatures and the decisions of the lower courts since *Hendricks* have unfortunately failed to define with sufficient precision the mental abnormality requirement and, in so doing, have failed to recognize the constitutional significance of the volitional control standard. As a result, legislatures are defining out of existence the constitutional content of the mental abnormality term, such that substantive due process now turns on mere predictions

of future violence. More importantly, absent proof of lack of volitional control, the stated *purposes* of the initial and continuing commitment—namely, treatment and protection from dangerousness—bear absolutely no relationship to the *nature* of the confinement itself. Where there is no volitional impairment, but only a prediction of violence, there is no illness to treat, and involuntary commitment resembles more closely a punitive, arbitrary exercise of power. In this way, conditions of confinement are inextricably linked to the reasons for commitment itself, such that failure to define with sufficient specificity the mental abnormality standard can render a commitment scheme unconstitutional both on its face, and as applied.

Washington's sexually violent predator statute, as it is construed and implemented, evidences such a punitive purpose and effect, and illustrates that the ostensibly legitimate goal of treatment can be but a pretext for punishment. As a result, Washington's failure to define, and apply to Mr. Young, with sufficient precision the "mental abnormality" standard violates the Due Process, Ex Post Facto, and Double Jeopardy Clauses of the United States Constitution.

Accordingly, *Amicus* respectfully urges the Court to clarify the constitutional role for mental abnormality as it was defined in *Hendricks*, reiterate the constitutional significance of lack of volitional control, and affirm the judgment of the Ninth Circuit in this case.

ARGUMENT

I. *KANSAS V. HENDRICKS*: THE CONSTITUTIONAL SIGNIFICANCE OF THE "MENTAL ABNORMALITY" STANDARD

In *Foucha v. Louisiana*, 504 U.S. 71 (1992), the Court struck down as unconstitutional a Louisiana law that required criminal defendants who were found not guilty by reason of insanity to remain in a psychiatric hospital until the person acquitted could prove that he was no longer

dangerous, regardless of whether he was still insane. This Court held that proof of dangerousness, standing alone, is constitutionally insufficient to justify forcible civil detention, finding that due process requires that an insanity acquitee may remain incarcerated only "'as long as he is both mentally ill and dangerous, but no longer.'" *Id.* at 77 (quoting *Jones v. United States*, 463 U.S. 354, 368 (1983)).

Relying on *Foucha*, the plaintiff in *Hendricks*, challenged the constitutionality of his civil commitment under Kansas' Sexually Violent Predator Act, which provides for the involuntary civil commitment of persons who, due to a "mental abnormality" or a "personality disorder," are likely to engage in "predatory acts of sexual violence." KAN. STAT. ANN. § 59-29a01 *et seq.* (1994). Mr. Hendricks, a diagnosed pedophile with an *admitted* inability to control his dangerous sexual behavior, alleged that, because commitment under Kansas' statute was predicated only on the existence of a "mental abnormality" rather than a "mental illness," the application of the law to him violated the United States Constitution's Due Process, Double Jeopardy, and Ex Post Facto Clauses. *See Hendricks*, 521 U.S. at 355-56.

Writing for the majority, Justice Thomas rejected these challenges and concluded that nothing in *Foucha* established as a constitutional predicate for commitment any categorical requirement of both "mental illness" and dangerousness. While recognizing that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment," Justice Thomas concluded that the Court had never required state legislatures to adopt any particular nomenclature in drafting civil commitment standards, and that the term "mental illness," as it was used in *Foucha*, was devoid of any "talismanic significance." *Id.* at 358-59. *Foucha* was read as fitting within the context of other cases, establishing only that proof of dangerousness must be coupled "with the proof

of some additional factor, such as a 'mental illness' or 'mental abnormality.'" *Id.* at 358.[2] Significantly, however, the Court also concluded that, like "mental illness," a finding of "mental abnormality" satisfies substantive due process because "it narrows the class of persons eligible for confinement to those who are *unable to control their dangerousness*." *Id.* (emphasis added).

Thus, while the Court in *Hendricks* recognized that the task of defining legally significant terms of a medical nature is one that is traditionally left to legislatures, nothing in the Court's opinion suggests that it intended to abandon constitutional limits on what legislatures may adopt for their definitions of those terms. To the contrary, the Court repeatedly suggested that the constitutional touchstone for civil commitment had to be a lack of volitional control. The Court stressed the significance of the lack of volitional control standard no less than ten separate times.[3] For example, in describing the involuntary civil commitment statutes it had previously upheld, the Court noted that those laws narrowly provided "for the forcible civil detainment of people who are unable to control their behavior." *Hendricks*, 521 U.S. at 357. Similarly, in upholding the Kansas Act, the Court stated that "[t]he precommitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of

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[2] Quoting *Heller v. Doe*, 509 U.S. 312, 314-15 (1993) (Kentucky statute permitting commitment of "mentally retarded" or "mentally ill" and dangerous individual). The Court also cited *Allen v. Illinois*, 478 U.S. 364, 366 (1986) (Illinois statute permitting commitment of "mentally ill" and dangerous individual), and *Minnesota ex rel Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 271-72 (1940) (Minnesota statute permitting commitment of dangerous individual with "psychopathic personality").

[3] *See* Eric S. Janus, *Foreshadowing the Future of Kansas v. Hendricks: Lessons From Minnesota's Sex Offender Commitment Litigation*, 92 NW. U. L. REV. 1279, 1281 & n.13 (1998) [hereinafter "Janus"].

persons eligible for confinement to those who are unable to control their dangerousness." *Id.* at 358. Perhaps most significantly, the Court based its opinion on the fact that Hendricks was a diagnosed pedophile with an admitted inability to control his dangerous sexual behavior and concluded that:

> To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria and Hendricks' condition doubtless satisfies those criteria.

Hendricks, 521 U.S. at 360.

In essence, the Court in *Hendricks* implied, if it did not expressly hold, that before a state may subject an individual to involuntary civil commitment, the Constitution requires a finding that the individual's mental illness or abnormality has rendered him unable to control his sexually dangerous behavior. In so holding, the Court reaffirmed its holding in *Foucha*, and recognized that "mental abnormality" and "mental illness" are constitutional functional equivalents, in that each serves to restrict the reach of the state's power of civil commitment to that limited subclass of dangerous persons who are unable to control their behavior. *See Hendricks*, 521 U.S. at 358.

Justice Kennedy's concurring opinion underscored the importance of the constitutional content of the "mental abnormality" requirement and sounded a warning for the future if the lower courts' scrutiny were to become too lax. Limiting his conclusion to the facts before the Court, Justice Kennedy's reasoned:

> On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental

> abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.

Id at 373 (Kennedy, J., concurring). Even Justice Breyer, though otherwise dissenting, joined the majority's rejection of Hendricks' substantive due process claim on the basis that Hendricks suffered from a "classic case of irresistible impulse" such that he could not control his urge to molest children.[4] *Id.* at 376 (Breyer, J., dissenting).

In the case now before this Court, both the Court's emphasis on the importance of an individual's inability to control his behavior and Justice Kennedy's admonition about the need for vigilance in that regard should not go unheeded.

II. LACK OF VOLITIONAL CONTROL IS CONSTITUTIONALLY REQUIRED

To the extent *Hendricks* could be viewed as not expressly holding that lack of volitional control is a constitutionally required predicate to civil commitment, *Amicus* respectfully submits that the Court should take this opportunity to do so now.

The constitutional significance of the lack of volitional control requirement cannot be overstated. As set forth in *Hendricks* and *Foucha*, civil commitment based on mere predictions of violence undoubtedly contravenes the express holdings of this Court. It is no accident, therefore, that *Hendricks* repeatedly returned to the volitional control requirement, because that requirement has constitutional significance for, and is determinative of, the resolution of constitutional challenges brought pursuant to three separate provisions of the Constitution: substantive due process, the

[4] Justice Breyer unambiguously conceded the significance of volitional control and focused on it directly no less than four times. *See* Janus, *supra*, note 3.

guarantee against double jeopardy, and the Ex Post Facto Clause.

A. Substantive Due Process

As a substantive requirement beyond proof of dangerousness, and without the limiting principle of volitional control in place, "mental abnormality" is not a very well-defined concept. *See* David L. Faigman *et al.*, *Modern Scientific Evidence: The Law and Science of Expert Testimony*, Ch. 36 *Sexual Aggressors*, § 36-1.0, at 75 (1997) [hereinafter "Faigman"]. Like the concept of "insanity," "mental abnormality" is a "term of legal convenience" created by state legislatures and does not necessarily "correspond to any psychological construct or specific diagnosis." *Id.*

Thus, absent the constitutionally imposed requirement of lack of volitional control, precommitment statutory standards of "mental abnormality" are illusory and incapable of any meaningful or limiting definition.[5] As Professor Faigman has observed,

> If, in fact, lack of "volitional control" is not a prerequisite to commitment in [Washington] or elsewhere, then only a finding of "mental abnormality" is required. The question remains, then, what does this term mean? Without the volitional component, the "additional factor" of mental abnormality appears to have no content. It is whatever the legislature says it is.

Faigman, *supra*, at 77; *see also In re Linehan*, 594 N.W.2d 867, 887 (Minn.), *cert. denied sub nom. Linehan v. Minnesota*, 120 S. Ct. 587 (1999) ("*Linehan IV*") (Page, J.,

[5] Indeed, "[i]f the constitutionally prescribed threshold of mental illness has no core meaning and can mean everything, then it means nothing." *Post v. Oldakowski*, 541 N.W.2d 115, 142 (Wis. 1995) (Abrahamson, J., dissenting).

dissenting); *Post v. Oldakowski*, 541 N.W.2d 115, 142-43 (Wis. 1995) (Abrahamson, J., dissenting).

More specifically, absent a requirement of volitional impairment, involuntary civil commitment is justified on the basis of mere predictions of future violence, and nothing more. To illustrate, Washington's statute provides, in pertinent part, that mental abnormality means:

> [A] congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

WASH. REV. CODE ANN. § 71.09.020(2) (West 1999).

If, then, mental abnormality does not mean lack of volitional control, a person is mentally abnormal because he is dangerous, and nothing more.[6] On that reasoning, "a person can be committed if he is both dangerous and dangerous." Faigman, *supra*, at 77. Such a standard is constitutionally flawed for several reasons.

First, it is precisely the standard that *Hendricks* and *Foucha* expressly forbid. In upholding the Kansas Act at issue in *Hendricks*, this Court expressly recognized that it did so on the basis that the statute requires a finding of future dangerousness, "and then *links* that finding to the existence of a 'mental abnormality' or 'personality disorder,'" conditions unequivocally associated with lack of volitional control. *Hendricks*, 521 U.S. at 358 (emphasis

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[6] For purposes of this brief, we assume, as we must, that predictions of dangerousness are achievable. *See Schall v. Martin*, 467 U.S. 253, 278 (1984) (observing that "*from a legal point of view* there is nothing inherently unattainable about a prediction of future criminal conduct") (emphasis added). Nonetheless, they are not always so. *See generally*, J. Monahan & Henry J. Steadman, *Violent Storms and Violent People: How Meteorology Can Inform Risk Communication in Mental Health Law*, 51 AM. PSYCHOL. 931 (1996); Faigman, *supra*, Ch. 7 *Predictions of Dangerousness*, § 7-2.0, at 308-18.

added). According to the Court, the likelihood of future dangerousness must be a *product* of a volitional impairment; mere predictions of violence simply cannot suffice.

Second, in the absence of a volitional control requirement, definitions of "mental abnormality" and "mental disorder," as they are legislatively defined, are circular and, therefore, without meaning. *See Hubbart v. Superior Court*, 969 P.2d 584, 611-12 (Cal.) (Werdegar, J., concurring), *petition for cert. filed*, No. 98-9130 (Apr. 27, 1999) (recognizing that the inherently tautological nature of the "mental abnormality" standard, as it is legislatively defined, implicates dangers alluded to in *Foucha*).

An analogous provision of California's Sexually Violent Predator Act proves the point. In describing the additional factor its law couples with the dangerousness component, the California Legislature has declared that:

> The continuing danger posed by these individuals and the continuing basis for their judicial commitment is a currently diagnosed mental disorder which predisposes them to engage in sexually violent criminal behavior.

STATS. 1995, ch. 763, § 1 (*quoted in Hubbart*, 969 P.2d at 587 n.5). On that state's reasoning, sexual predators are dangerous because they have a mental disorder, and they have a mental disorder because they are violent. *See* Faigman, *supra*, at 77 n.32.

Third, and in a related vein, if substantive due process does not require proof of lack of volitional control, civil confinement becomes a mechanism for retribution and general deterrence, as it punishes people for being merely "bad," rather than for being "mad." However, constitutional principles dictate that such punitive goals are reserved for the criminal system alone. *See Hendricks*, 521 U.S. at 378 (Breyer, J., dissenting). As Professor Morse has recognized, "if anyone who has a tendency to engage in sexual violence is abnormal, then the term 'mental abnormality' is circularly

defined and does no independent conceptual or causal work. Moreover, such a definition collapses all badness into madness." Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 137 (1996).

Fourth, and perhaps even more fundamentally, the failure to recognize volitional control as a limiting principle impermissibly eliminates the boundary between civil commitment and criminal liability.[7] With respect to those who commit sexually violent acts, legitimate objectives of civil commitment include: (1) prospectively protecting the health and safety of the community; and (2) providing treatment and rehabilitation for the individual committed. *See Hendricks*, 521 U.S. at 357. Alternatively, legitimate state objectives for imposing criminal liability include punishment and retribution, and accordingly, states may imprison sexual offenders who choose to violate the law. *See Foucha*, 504 U.S. at 80.

It follows, then, that detention by way of civil commitment to confine those who cannot control their behavior is a legitimate exercise of the police power and furthers legitimate goals of protection and treatment. Nonetheless, the Constitution does not permit preventive detention in the criminal context, because the state may not punish an individual on the basis of mere predictions of dangerousness alone. *See Foucha*, 504 U.S. at 83 (recognizing that civil commitment without proof of current mental illness would be but a step away "from substituting confinements for dangerousness for our present system,

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[7] As Professor Janus points out, preserving the constitutional distinction between civil and criminal proceedings is particularly important insofar as "[c]ivil commitment laws deprive people of their liberty, but do not demand the strict procedural and substantive protections of the criminal law." Janus, *supra*, at 1279 n.2; *see also Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring) (describing more broadly the relevant constitutional question as whether the civil or criminal system is the appropriate mechanism for imposing upon sexually violent persons otherwise legitimate social controls).

which, with only narrow exceptions . . ., incarcerates only those who are proved beyond a reasonable doubt to have violated a criminal law").

Accordingly, in order to preserve the constitutional distinction between civil commitment and criminal liability, something more than dangerousness must be shown—namely, that an individual lacks the capacity to control his sexually dangerous behavior. *See Hendricks*, 521 U.S. at 358; *see also* Carol S. Steiker, *Forward: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 785-92 (1998) [hereinafter "Steiker"]. Indeed, justifying involuntary commitments in cases where a person *chooses* to engage in a criminal act fails to preserve the constitutional distinction between criminal and civil proceedings and constitutes an impermissible, unconstrained exercise of police power. *See* Janus, *supra*, at 1284. That failure leaves unchecked civil commitment schemes that sweep within their reach *all* sexually dangerous criminals, which, in turn, renders such detention punitive in both purpose and effect. *See, e.g.*, John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375 (1999).

Thus, legislatures must reserve indefinite civil commitment for those who are truly incapable of choosing to understand or comply with the law because "those able to so choose should have their liberty and their autonomy respected by being treated as rational beings—and thus prosecuted pursuant to the criminal law should they choose to do wrong." Steiker, *supra*, at 785. The greater control an individual exercises over his behavior, the more he is responsible for the consequences. This is a basic premise of American criminal law. If a person truly cannot control his behavior, he is more likely to escape criminal punishment

under doctrines of excuse, such as insanity.[8] This lack of control also justifies civil intervention, as occurred in *Hendricks*. But for those who can control their actions, it is the criminal system, not the civil, that operates to deter them from, and hold them responsible for, dangerous conduct.

Lastly, absent a requirement that an individual must be found to be dangerous beyond his volitional control, legislatively defined standards of "mental abnormality" cannot be narrowly tailored to further legitimate state objectives, since every sexually dangerous individual would be subject to forcible civil detention, whether or not he is dangerous beyond his control.[9] *See* Steiker, *supra*, at 786 (stating that "virtually all of those who choose to commit criminal acts ... can be considered 'abnormal'"); *see also Linehan IV*, 594 N.W.2d at 881 n.9 (Page, J., dissenting) (observing that the "lack of adequate control" standard "would allow the state to indefinitely commit any class of individuals who have a record of past harmful conduct, suffer from a mental illness or mental abnormality, and who will likely engage in harmful conduct in the future"). At some

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[8] It should be noted, however, that the predominant test of insanity in the United States, the *M'Naghten* "right/wrong" test, does not have a volitional control element. Under the *M'Naghten* test, a defendant is excused if he did "not ... know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." *M'Naghten's Case*, 1843-60 All E.R. 229, 233 (H.L. 1843). The American Law Institute's test for insanity, in contrast, contains both cognitive and volitional prongs: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." MODEL PENAL CODE § 4.01(1) (1985); *see generally* Faigman, *supra*, Ch. 6 *Insanity and Diminished Capacity*, § 6-1.2.4, at 227.

[9] That result is compounded by the sweeping list of mental disorders included in the DSM-IV, such as anorexia, bulimia, insomnia, agoraphobia, and caffeine-induced anxiety disorder. *See* American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 213, 396, 439, 539-57 (4th ed. 1994) ("DSM-IV").

level, virtually every criminal offender has failed to exercise volitional control over his behavior. The relevant constitutional question, however, and the only meaningful mechanism for distinguishing among offenders, is whether those individuals who *failed* to exercise control also lacked the volitional *capacity* to do otherwise. Absent such a finding, civil commitment statutes cast a wide net designed both in purpose and effect to confine all sexually dangerous persons, without regard for any additional factor. *Cf. Hendricks*, 521 U.S. at 357 (stating that involuntary civil commitment is justified where it is restricted to a *limited subclass* of dangerous persons).

B. Ex Post Facto and Double Jeopardy

> An avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, and to misapply even the best of laws. He that would make his own liberty secure must guard even his enemy from oppression; for if he violates his duty he establishes a precedent that will reach to himself.

Thomas Paine, *Dissertation on First Principles of Government*, in *The Complete Writings of Thomas Paine* 588 (Philip S. Froner ed. 1945).

The Ex Post Facto Clause prohibits laws that retroactively alter the definition of crimes or increase the punishment for criminal acts. *See Collins v. Youngblood*, 497 U.S. 37, 43 (1990). Its fundamental purpose is to ensure fair warning of the consequences of violating penal statutes and to reduce the potential for vindictive legislation. *See Landgraf v. USI Film Products*, 511 U.S. 244, 266-67 (1994). A law also violates the Ex Post Facto Clause if it inflicts upon a person a greater punishment than did the law annexed to his crime at the time the crime was committed. *See Calder v. Bull*, 3 Dall. 386, 390, 1 L. Ed. 648 (1798).

The Double Jeopardy Clause provides that no person may "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. That provision protects persons not only from a second trial for the same offense, but also "'prevent[s] the criminal from being twice punished for the same offense.'" *North Carolina v. Pearce*, 395 U.S. 711, 718 (1969) (quoting *Ex Parte Lange*, 18 Wall. 163, 168 (1873).

The key to analyzing whether statutory definitions, both as they are construed and judicially applied, violate the guarantee against double jeopardy and the Ex Post Facto Clause is the determination of whether those provisions are civil or criminal in nature. *See Hendricks*, 521 U.S. at 361. That determination, in turn, depends on whether or not the challenged law operates as a punishment. *See id.* at 361.

In assessing the punitive nature of the Kansas commitment scheme, the Court in *Hendricks* considered whether that statute was punitive in purpose or effect. *See id.* In concluding that it was not, the Court rejected the contention that the Kansas Legislature "intended the Act to function as a deterrent." *Id.* at 362. According to the Court, the principal reason for its conclusion was its construction of the mental abnormality requirement. Specifically, as the Court explained:

> Those persons committed under the Act are, by definition, suffering from a "mental abnormality" or "personality disorder" *that prevents them from exercising adequate control over their behavior.* Such persons are therefore unlikely to be deterred by the threat of confinement.

Id. at 362-63 (emphasis added).

As the Court recognized, where a sexually dangerous individual lacks the capacity to control his sexually dangerous behavior, he is by all accounts, incapable of being deterred. In such cases, civil commitment, under certain

narrow circumstances, may be justified. *See id.*; *see also Hubbart*, 969 P.2d at 515.

In sharp contrast, where a sexually dangerous individual fails *by choice* to exercise volitional control over his criminal acts, he can be deterred from committing future acts of misconduct through the imposition of facially civil sanctions. *Cf. Hendricks*, 521 U.S. at 362-63. If he is capable of being deterred, then the attempt to do so looks like punishment. Similarly, if commitment is not based on a finding of volitional impairment, then it resembles more closely commitment based on a criminal intent. *Cf. id.* That evinces the other traditional aim of punishment: retribution.

The same circularity noted above also applies in the ex post facto and double jeopardy contexts. Absent a requirement of lack of volitional control, all "badness" is collapsed into "madness." As a result, civil detention is no longer justified on the basis of treatment and protection, but rather, resembles more closely a mechanism for retribution and deterrence, in that it punishes people who are merely bad, rather than treating people who are mad. *See Hendricks*, 521 U.S. at 371 (Kennedy, J., concurring).

It follows then that where state legislatures fail to define "mental abnormality" in a way that requires proof of substantial lack of volitional control and, more importantly, where courts fail to require that such a precommitment showing be made, those who are capable of exercising some meaningful degree of control over their actions will be deterred by the threat of civil commitment, which, in turn, becomes but a mere pretext for punishment.

Perhaps even more importantly, absent proof of volitional impairment, both the initial and continuing confinement of sexual offenders is based solely on proof of future dangerousness. If, however, treatment and protection from dangerousness are the expressed legislative goals—and, notably, the *only* legitimate objectives for state-imposed civil commitment—then the stated reasons

for the confinement bear absolutely no relationship to the nature of the confinement itself. Indeed, where there is no volitional impairment, but only a showing of dangerousness, there can be no "disorder" or "illness" to treat or cure, thus involuntary commitment becomes but a sham for punitive, unjustified preventive detention. *See id.* at 382 (Breyer, J., dissenting). Clearly, such a scheme renders conditions of confinement both an arbitrary exercise of state power, and punitive in purpose and effect.[10] *Cf. Allen v. Illinois*, 478 U.S. 364, 370-73 (1986).

C. State Legislatures and the Lower Courts Have Failed to Require Lack of Volitional Control

Amicus respectfully submits that, since *Hendricks*, both the state legislatures and the lower courts have failed to define with sufficient precision the mental abnormality requirement and, in so doing, have failed to recognize the constitutional significance of the volitional control standard. They have thereby also failed to articulate the practical content of the constitutional requirement that a civil committee "lack volitional control" before he can be civilly committed. Thus, despite this Court's long-standing recognition that dangerousness alone is insufficient to justify involuntary civil detention, predictions of violence alone have effectively become the leitmotif of constitutionality.

A particularly good example of the problem arose in Minnesota, where the state Supreme Court struggled with the question of whether *Hendricks* required the state to show a "total" lack of control before a person could be civilly committed. In *Linehan IV*, 595 N.W.2d at 873-76, the court considered a challenge under the United States Constitution

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[10] This conclusion is not undermined by the majority's opinion in *Hendricks*. To the contrary, the Court held only because Hendricks' condition could not be treated, the Constitution did not require his release for the state's failure provide such treatment. *See Hendricks*, 521 U.S. at 364. The Court, however, has not concluded that where treatment is available and efficacious, the state is under no constitutional obligation to provide it.

to its state's Sexually Dangerous Person Act, which provides, in pertinent part, that, in defining whether an individual is a "sexually dangerous person," "it is not necessary to prove that the person has an inability to control [his or her] sexual impulses." MINN. STAT. ANN. § 253B.02(18)(c)(b) (West 1999).

Over a vigorous dissent, a majority of the court rejected the application of the *Pearson*[11] "utter lack of control" test and held that, while "some degree of volitional control must be evidenced to satisfy substantive due process," neither *Hendricks* nor the Due Process Clause requires a finding of total lack of control before civil detention can be justified. *Linehan IV*, 594 N.W.2d at 873-76. Rather, the court determined that because *Hendricks* required only a finding of future dangerousness, linked to a "mental abnormality" or "personality disorder" ""that makes it difficult, if not impossible, for the person to control his dangerous behavior,"" the state Legislature was free to abandon the "utter lack of control" test required by decisional law for other civil commitments. *Id.* (quoting *Hendricks*, 521 U.S. at 358).

Thus, according to the Minnesota court, involuntary civil commitment is justified where sexually dangerous persons who have engaged in a prior course of sexually harmful behavior cannot *adequately control* their sexual impulses by reason of a present disorder or dysfunction. *See Linehan IV*, 594 N.W.2d at 876. Unfortunately, the court did not specify what degree of control constitutes adequate control. This has proved to be a pervasive reaction to the "mental abnormality" standard following *Hendricks*. Although it may be true that a constitutional requirement of "total" lack of control would prove unworkable, the failure of state legislatures and lower courts to specify what level of "lack of

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[11] 309 U.S. at 271-72.

control" must be proven by the state effectively eviscerates this factor's narrowing function.

Similarly, the California Supreme Court in *Hubbart*, failed to articulate with sufficient precision the constitutional content of the mental abnormality standard. In that case, the court construed the meaning of "diagnosed mental disorder" under California law and determined that, because the "Act targets sexual offenders who suffer from a diagnosed 'volitional impairment' making them 'dangerous beyond their control,'" the Act's language comports fully with the requirements of substantive due process.[12] *Hubbart*, 969 P.2d at 596 (quoting *Hendricks*, 521 U.S. at 358). However, while the court in *Hubbart* recognized that due process requires an inability to control dangerous conduct, and upheld against a facial challenge a provision requiring just that, nothing surrounding the facts of Hubbart's commitment indicates that *his* lack of volitional control was established beyond a reasonable doubt. *See Hubbart*, 969 P.2d at 591-92. The court did not suggest otherwise.

Finally, in at least one state, North Dakota, the Legislature has failed to provide any statutory definition whatsoever for "mental abnormality." *See* N.D. CENT. CODE § 25-03.3-01(7) (1999). The courts of that state have fared no better. *See, e.g., In the Interest of M.D.*, 598 N.W.2d

[12] Several states have adopted substantially similar, if not identical definitions. *See e.g.*, FLA. STAT. ANN. § 394.912(5) (West 1999); IOWA CODE ANN. § 229A.2(4) (West 1999); ILL. COMP. STAT. § 207/5(b) (West 1999); KAN. STAT. ANN. § 59-29a02(b) (West 1999); MASS. GEN. LAWS, ch. 6, § 178C (1999); MO. ANN. STAT. § 632.480(2) (West 1999); MINN. STAT. ANN. § 253B.02(18)(c) (West 1999); N.J. STAT. ANN. § 30:4-27.26 (West 1999); S.C. CODE ANN. § 44-48-30(1)(b) (1999); VA. CODE ANN. § 37.1-70.1 (Michie 1999); WIS. STAT. ANN. § 980.01(2) (West 1999); *see also* TEX. HEALTH & SAFETY CODE ANN. § 841.002(2) (West 1999) (defining "behavioral abnormality" as a "congenital or acquired condition that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person").

799, 807-08 (N.D. 1999). And, perhaps even more troubling, Arizona's Sexually Violent Persons Statute tautologically provides that "mental disorder" means a "paraphilia, personality disorder or conduct disorder or any combination [thereof] that predisposes a person to commit sexual acts to such a degree as to render the person a danger to the health and safety of others." ARIZ. REV. STAT. ANN. § 36-3701(5) (West 1999). Thus, in Arizona, involuntary civil commitment is justified where, based on past acts of sexual misconduct, a person is diagnosed with a personality disorder, which, in turn, renders him likely to engage in future acts of sexual misconduct.[13]

As *Hendricks* makes clear, for a person to be civilly committed as a sexually violent person, the Constitution requires the state to prove, by the requisite burden of proof, two independent facts: (1) that the defendant is dangerous, *and* (2) that his dangerousness is not within his volitional control. While *Hendricks* gives the states some discretion to define "the additional factor" of "mental abnormality," it does not permit them to do so in a way that eviscerates it as a requirement. Yet a review of the various laws shows that too many states and courts have done just that. The definition of "mental abnormality" as written and applied has collapsed the two requirements into one—proving that the individual is dangerous. Experience has demonstrated the prescience of Justice Kennedy's concern in *Hendricks*

[13] That result is not altered by the mere fact that Arizona requires as a predicate to commitment a diagnosed paraphilia, personality disorder, or conduct disorder. To the contrary, the DSM-IV expressly concedes:

> The fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.

DSM-IV, *supra*, at xxiii.

that "mental abnormality" might prove to be "too imprecise a category" to satisfy the Constitution. *Hendricks*, 521 U.S. at 374 (Kennedy, J., concurring).

Volitional control falls along a spectrum from total control to total lack of control. The states should be constitutionally required to specify what degree of lack of control their statutes require. Moreover, the degree of lack of control required must be substantial. From a constitutional perspective, based on the logic of *Hendricks*, volitional control and the objectives of the criminal law, deterrence and retribution, are inversely related. The more control a person exerts over his behavior, the less justification there is for civil commitment. The states' failure to define operationally the lack of control core of "mental abnormality," and their failure to require that this factor be proved independently by sufficient evidence, renders their commitment schemes unconstitutional.

D. Application to Mr. Young of the Washington Act Violates the Constitution

Without repeating the points that Mr. Young has argued in his own behalf, *Amicus* respectfully submits that its analysis shows that there is an independent basis for affirming the decision below.[14]

Similar to the Minnesota and California statutes, Washington's Sexually Violent Predators Act defines "mental abnormality" as "a congenital or acquired condition *affecting the emotional or volitional capacity* which predisposes the person to the commission of criminal sexual acts." WASH. REV. CODE ANN. § 71.09.020(2) (emphasis added). Contrary to the Court's analysis in *Hendricks*, nothing in Washington's statute expressly requires the

[14] *See Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (stating that "[a]s the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals").

State to demonstrate a lack of volitional control before civil detention is justified. Rather, a person can be indefinitely committed merely upon proof that he failed to exercise control, whether or not with some degree of emotional or volitional choice. More significantly, Washington courts have failed to read *Hendricks* as establishing lack of volitional control as a constitutional standard.

In rejecting Mr. Young's claim that the Washington courts' interpretation of the term "mental abnormality" is unconstitutionally vague, the Ninth Circuit summarily concluded that, "while the statute's failure to limit its reach to those who completely lack control may be an indicia of a forbidden deterrent purpose, this failure does not, by itself, render the statute unconstitutional." *Young v. Weston*, 192 F.3d 870, 876 (9th Cir. 1999), *cert granted sub nom. Seling v. Young*, 120 S. Ct. 1416 (2000). Thus, according to the court, civil commitment can be justified absent a showing that Mr. Young lacked the ability to control his sexual dangerousness.[15] In this regard, the law of Washington as it was construed and applied to the facts of Mr. Young's case fails to conform to the precedents of this Court. The Ninth Circuit's failure to require proof of Mr. Young's lack of volitional control as a constitutional predicate to

[15] Further underscoring the need for clarification, in *In re the Detention of Brooks*, 973 P.2d 486, 492-93 (Wash. Ct. App.), *review granted sub nom. Brooks v. State*, 989 P.2d 1136 (Wash. 1999), the court construed the meaning of "mental abnormality" under Washington law and concluded that no showing of lack of volitional control is required by the Constitution. In so holding, the court conceded that the statutory requirement of "mental abnormality" limits "'involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control.'" *Id.* at 492 (quoting *Hendricks*, 521 U.S. at 358). Nevertheless, the court determined that nothing in *Hendricks* requires a "total lack of control," rather, the state need only demonstrate that a "mental abnormality" makes it "'difficult, if not impossible, for the person to control his dangerous behavior.'" *Id.* Again, other than this passing tip of the hat to *Hendricks'* "lack of control" language, the court provided absolutely no guidance to a committing court regarding how to concretely define this constitutional requirement.

confinement violates substantive due process, the guarantee against double jeopardy and the Ex Post Facto Clause.

This Court's holding in *Hendricks* does not alter the result. To the contrary, the facts of that case unquestionably distinguish it from the one now before the Court. First, Mr. Hendricks was diagnosed as suffering from pedophilia, a condition the psychiatric community itself defines as a serious mental disorder. *See Hendricks*, 521 U.S. at 360. In sharp contrast, Mr. Young's initial, and more importantly, continuing commitment is based on an unrecognized combination of diagnoses, neither of which standing alone would necessarily justify his current commitment. *Cf. id. at* 360 (commitment of diagnosed pedophile); *Heller*, 509 U.S. at 315 (commitment of "mentally retarded" or "mentally ill" individual); *Allen*, 478 U.S. at 366 (commitment of "mentally ill"). Indeed, one aspect of Mr. Young's alleged condition, the "paraphilia not otherwise specified, rape," is not specifically recognized in the DSM-IV, and is, according to the State's testifying expert, controversial within the scientific community.

Second, unlike Leroy Hendricks, Mr. Young never conceded a lack of volitional control. Indeed, that crucial fact was never established at trial, and neither the trial court nor the testifying expert ever made findings regarding Mr. Young's ability to control his behavior. Rather, Mr. Young was, and is, currently committed absent proof that he suffers from any lack of volitional control. That is in sharp contrast to Hendricks' *admitted* lack of volitional control, which the Court clearly viewed as essential to its holding: "this admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." *Hendricks*, 521 U.S. at 360.

Third, the second component of Mr. Young's diagnosis, "personality disorder not otherwise specified," is not a

constitutionally adequate grounds for continuing civil commitment. That diagnosis sweeps within its reach *all* sexually dangerous offenders who happen to suffer "significant distress or impairment in one or more important areas of functioning" and, in so doing, fails to distinguish among the limited subclass of criminals who are unable to control their behavior. *Cf. Hendricks*, 521 U.S. at 360; *Foucha*, 504 U.S. at 82-83.

Here too, the facts of *Hendricks* are distinguishable. There, the Court assessed the constitutionality of Hendricks' commitment based on his diagnosed pedophilia. No claim was made that Hendricks suffered from a personality disorder. As such, the Court did not consider the constitutionality of commitment based on a finding of personality disorder and, more significantly, did not overrule its prior ruling of *Foucha*, wherein the Court expressly rejected as sufficient a diagnosis of "antisocial personality disorder." *Foucha*, 504 U.S. at 77-79. Here, as in *Foucha*, continuing commitment on the basis of a "personality disorder," is, essentially, commitment on the basis of future dangerousness alone. *See id.*

Finally, the State's failure to establish Mr. Young's lack of volitional control, or even *any* additional factor over and above a showing of dangerousness, is inextricably linked to his conditions of confinement. Because his current commitment is unconstitutional, the *nature* of his confinement bears no reasonable relationship to the *purposes* of that confinement. Absent proof of Mr. Young's lack of volitional control, the conditions of his confinement cannot be linked to the stated purposes of his commitment, namely treatment. Thus, in this case, there are no means of furthering legitimate state objectives necessary for justifiable civil commitment. And, as a result, all that remains is arbitrary, punitive preventive detention, which is itself an unconstitutional condition of confinement.

Moreover, *Foucha* unquestionably requires that once a committee is no longer mentally ill, involuntary civil commitment is no longer justified and he must be released. So too, where, as here, the State has failed to establish anything more than a record of past convictions, Mr. Young's current confinement can no longer stand. Thus, in direct contravention of *Foucha* and *Hendricks*, Mr. Young is currently confined on the basis of his potential for dangerousness alone; therefore, his continuing confinement is unconstitutional.

At base, Washington's sexually violent predator statute, as it was construed and implemented, evidences a punitive purpose and effect, and illustrates that the ostensibly legitimate goal of treatment can be but a pretext for punishment. Furthermore, Mr. Young's continuing commitment is based on mere predictions of violence, which undoubtedly fails to comport with substantive due process and contravenes the express holdings of this Court.

Mr. Young was, and continues to be, involuntarily committed without any proof that he suffers from any lack of volitional control. His continuing confinement is unconstitutional unless, and until, the state proves that he is both sexually dangerous and unable to control his dangerous behavior. Because the state failed to carry its heavy burden, Mr. Young is entitled to an individualized evidentiary hearing for a determination of whether he is, in fact, "mentally abnormal" within the meaning of the United States Constitution.

CONCLUSION

Amicus does not question that the states have the discretion to define legally significant terms of a medical nature. But they must do so within the confines of the United States Constitution, and as demonstrated above, Washington and too many other states have failed in that regard. They have, instead, adopted definitions of "mental abnormality" that have effectively eviscerated that term as

a limiting "additional factor." As is well illustrated by Mr. Young's case, the states have permitted "mental abnormality" to become so "imprecise a category" that civil detention has become criminal punishment. As a result, Mr. Young, and too many others in too many states, have been civilly committed for indefinite periods with no meaningful proof that they lack volitional control. They have been committed solely on the ground that they are dangerous.

Amicus, therefore, respectfully urges the Court to clarify the constitutional role for mental abnormality as it was previously articulated in *Hendricks* and to reiterate the constitutional significance of the lack of volitional control standard.

Furthermore, because Washington's sexually violent predator statute, as it is has been defined and applied to Mr. Young, violates the Due Process, Ex Post Facto and Double Jeopardy Clauses of the United States Constitution, *Amicus* respectfully requests that the Court affirm the holding of the Ninth Circuit below.

Respectfully submitted,

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No. 99-1185

JUL 10 2000

In The

Supreme Court of the United States

MARK SELING, Superintendent,
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether a state civil commitment law directed at sexual predators whose actual implementation has been pervasively punitive throughout its nine year history violates double jeopardy, *ex post facto*, and due process protections where the statute's punitive "purpose or effect" is demonstrated by the "clearest proof".

2. Whether a federal court exercising habeas corpus jurisdiction is precluded from considering institutional conditions of confinement in determining whether a commitment regime labeled "civil" by the state legislature is instead punitive in "purpose or effect" under the Due Process, *Ex Post Facto* or Double Jeopardy clauses of the Constitution.

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide – along with 80 state and local affiliate organizations numbering 28,000 members in all fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Foremost among NACDL's objectives is to promote the proper administration of justice. It has appeared before this Court as *amicus curiae* on numerous occasions. *See, e.g., Jones v. United States,* 526 U.S. 227 (1999); *Richardson v. United States,* 526 U.S. 813 (1999).[1]

STATEMENT OF THE CASE

This case involves the constitutionality of Washington State's Sexually Violent Predator statute as it applies to Respondent Andre Young. Young has been indefinitely

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[1] All parties have consented to the appearance of NACDL as *amicus curiae* in this matter and letters of consent have been lodged with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

confined under the statute since the expiration of his criminal sentence in 1990. While the present case was pending in the lower courts, this Court decided *Kansas v. Hendricks*, 521 U.S. 346 (1997). By a 5-4 vote, the *Hendricks* majority rejected a facial challenge to a Kansas statute modeled on Washington's, finding that the involuntary commitment of sexually violent predators, even where postponed until the expiration of their criminal sentences, did not violate the substantive due process, *ex post facto* or double jeopardy clauses of the Constitution.

Notably, the *Hendricks* Court determined that by committing sex offenders "to an institution expressly designed to provide psychiatric care and treatment," the state "has doubtless satisfied its obligation to provide available treatment" (521 U.S. at 368 n.4) – a determination with which the dissenters took specific issue. *Id.* at 381-86, 390 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).

Notwithstanding *Hendricks*' rejection of facial challenges to sexual predator statutes, the Court of Appeals in this case held that the detailed factual allegations presented by Respondent, particularizing the specifics of his and other inmates' punitive, nontherapeutic confinement, nevertheless presented a colorable constitutional challenge to the Washington statute as it applied to him. *Young v. Weston*, 192 F.3d 870, 875 (9th Cir. 1999). In doing so, the Court of Appeals properly took note of this Court's earlier admonition in the analogous case of *Allen v. Illinois*, 478 U.S. 364, 373 (1986)("Had petitioner shown, for example, that the confinement ... imposes ... a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case").

In point of fact, the punitive, nontherapeutic conditions of confinement at the Special Commitment Center

(SCC), located on the grounds of the state prison at McNeil Island, has been the subject of extensive federal civil rights litigation since 1991. *See Turay v. Seling*, No. C 91-664 WD (W.D.Wash. filed May 5, 2000)(Findings of Fact, Conclusions of Law, And Order Granting Sanctions In Part)(lodged with the Clerk of this Court); *see also id.*. (W.D.Wash. filed November 15, 1999)(Findings of Fact, Conclusions of Law and Contempt Order)(annexed to Cert. Opp. App. B in this Court).

In its most recent set of rulings, dated May 5, 2000, the federal district court (William L. Dwyer, J.) found as follows (*id.* at 5):

> The central issue in the present [consolidated] cases is whether the defendants are providing constitutionally adequate mental health treatment to the plaintiff SCC residents as required by due process and the Supreme Court decisions cited above. The finding that SCC has failed to provide such treatment in the past has been made not just by the jury and the district judge in the present cases, but also by the State of Washington's Inspection of Care (IOC) Report issued in October 1999, by the Superior Court for the State of Washington for King County, by the special master herein, by other experts including one called by defendants at an earlier hearing, and even by the SCC's recently-departed clinical director and current superintendent.

Under the totality of circumstances, then, and given the record developed in the *Turay* litigation, it may hardly be said that the Court of Appeals' remand for an evidentiary hearing in this case lacked a substantial basis in fact.

SUMMARY OF ARGUMENT

Habeas corpus is the appropriate remedy by which to attack punitive conditions of post-imprisonment confinement of a sexual predator where the constitutional bases of attack are the due process, double jeopardy and *ex post facto* clauses of the Constitution and the relief sought is release from custody. This Court has recognized that habeas corpus is a concurrent federal remedy by which a state prisoner may contest the conditions of his confinement and seek his release.

Habeas corpus is also an equitable remedy with broad power to adopt such procedures, including discovery and evidentiary hearings, and provide such relief, including release from custody, "as law and justice require".

Habeas corpus is the federal remedy that provides the broadest flexibility in administration and in the fashioning of relief, given recently-enacted Congressionally-imposed limitations placed on the federal courts in the conduct of §1983 state prison conditions litigation under the Prison Litigation Reform Act of 1995. The PLRA leaves habeas corpus litigation virtually untouched nor are the limitations introduced by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) relevant here.

ARGUMENT

HABEAS CORPUS IS THE APPROPRIATE REMEDY TO ATTACK THE PUNITIVE CONDITIONS OF CONFINEMENT OF A SEXUAL PREDATOR AS VIOLATIVE OF THE DOUBLE JEOPARDY, *EX POST FACTO* AND DUE PROCESS CLAUSES OF THE CONSTITUTION

Andre Young was committed directly upon the completion of his penal sentence in 1990 to Washington's Special Commitment Center, a facility run by the State's Department of Social Services and located in one of the State's maximum security prisons, after having been found a "sexually violent predator" under the applicable Washington statute. RCW ch. 71.09.

The Washington state courts refused Respondent's repeated proffers of evidence demonstrating the punitive, nontherapeutic conditions at SCC, finding only that the commitment procedures passed constitutional muster even after he had already fully served his criminal sentence. *In re Young*, 122 Wash.2d 1, 857 P.2d 989 (1993). (Only recently, the Washington Supreme Court has twice reiterated its disinclination to entertain claims concerning punitive confinement at SCC. *See In re Detention of Campbell*, 139 Wash.2d 341, 347-50, 986 P.2d 771, 774-76 (1999); *In re Detention of Turay*, 139 Wash.2d 379, 415-22, 986 P.2d 790, 809-13 (1999); *although compare Campbell, id. at* 362-72, 781-86 (Sanders, J., dissenting); *Turay, id. at* 436-40, 820-22 (Sanders, J., dissenting)).

Nevertheless, the Court of Appeals for the Ninth Circuit ruled that Respondent was entitled to an evidentiary hearing to sustain his detailed claims that the Washington commitment scheme and its actual implementation at SCC was punitive in its effect. Should he sustain his burden by

"the clearest proof", the court ruled that his commitment should be set aside as violations of the double jeopardy and *ex post facto* clauses of the Constitution. *Young v. Weston*, 192 F.3d 870, 873-76 (9th Cir. 1999). Significantly, the court of appeals so ruled in the exercise of its habeas corpus jurisdiction.

Habeas Corpus Is A Concurrent Federal Remedy By Which To Address Punitive Conditions Of Confinement

In clarifying the relation between an action for habeas corpus (28 U.S.C. §2254) and a civil rights action (42 U.S.C. §1983) as vehicles for state prisoners to challenge their confinement on constitutional grounds, this Court has set forth certain bright line rules. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Court held that prisoners challenging the fact or duration of their physical confinement, seeking immediate or speedier release from imprisonment, must pursue habeas corpus as their principal federal remedy. Where grievances relate to the conditions of confinement, as opposed to release, the federal remedy ordinarily is a civil rights action. *Id.*. at 499-500 & nn.14 & 15. *See also Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991)(Posner, C.J.).

Nevertheless, this Court has noted that habeas corpus is a "concurrent federal remed[y] in prison condition cases" along with §1983. *Preiser*, 411 U.S. at 499-500 (citing *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971); *Johnson v. Avery*, 393 U.S. 483 (1969)). *See also Humphrey v. Cady*, 405 U.S. 504, 514 (1972)(petitioner entitled to challenge via habeas corpus his "substantial constitutional claims" concerning the place and character of his confinement in a prison unit labeled "Sex Deviate Facility"); *Albers v. Ralston*, 665 F.2d 812, 815-16 (8th Cir. 1981)(prisoners may challenge conditions of confinement via habeas corpus); *Willis v. Ciccone*, 506 F.2d 1011, 1014-19 (8th Cir. 1974).

Among the lower courts, it is well settled that habeas corpus challenges the place as well as the fact of confinement, even if the challenged place is a particular hospital ward. *See, e.g., Covington v. Harris*, 419 F.2d 617, 620-21 (D.C. Cir. 1969)(citing *In re Bonner*, 151 U.S. 242 (1894)); *Schuster v. Herold*, 410 F.2d 1071 (2d Cir. 1969); *Dixon v. Jacobs*, 427 F.2d 589, 597-98 & n.26 (D.C. Cir. 1970). *See also Stultz v. Cameron*, 383 F.2d 519, 520-21 (D.C. Cir. 1967); *Lake v. Cameron*, 364 F.2d 657 (D.C. 1966); *Miller v. Overholser*, 206 F.2d 415, 419 (D.C. Cir. 1953).

In *Covington v. Harris*, the D.C. Circuit deemed habeas corpus the appropriate remedy where petitioner alleged that his confinement in the maximum security wing of a psychiatric facility violated his liberty interest under the due process clause (419 F.2d at 623-24):

> It makes little sense to guard zealously against the possibility of unwarranted deprivations prior to hospitalization, only to abandon the watch once the patient disappears behind hospital doors. The range of possible dispositions of a mentally ill person within a hospital, from maximum security to outpatient status, is almost as wide as that of dispositions without. The commitment statute no more authorizes unnecessary restrictions within the former range than it does within the latter. * * * [A]dditional restrictions beyond those necessarily entailed by hospitalization are as much in need of justification as any other deprivations of liberty; nor does it preclude all judicial review of internal decisions.[2]

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[2] The *Covington* court took note of the punitive nature of petitioner's maximum security confinement (*id.* at 622-23):

Nor does the mere denomination of the confinement as "civil" or "regulatory" change its essentially punitive character. As this Court noted in *Powell v. Texas*, 392 U.S. 514, 529 (1968):

> One virtue of the criminal process is, at least, that the duration of penal incarceration has some outside statutory limit; * * * "Therapeutic civil commitment" lacks this feature; one is typically committed until one is "cured". Thus, [those committed] might [be] subject[ed] to the risk that they may be locked up for an indefinite period of time under the same conditions as before, with no more hope than before of receiving effective treatment and no prospect of periodic "freedom".

Thus, in terms which appear prescient with regard to the case at bar, the *Powell* Court concluded, "we run the grave risk that nothing will be accomplished beyond the hanging of a new sign -- reading "hospital" -- over one wing of the jailhouse" (*id.* at 529).

This Court has repeatedly recognized that the special confinement of those involved in the criminal process deemed mentally ill raise unique constitutional issues warranting heightened scrutiny given the special liberty interests involved. *See, e.g., Jackson v. Indiana*, 406 U.S. 715, 738 (1972)("Due process requires that the nature and duration of the commitment bear some reasonable relation to the purpose for which the individual is committed"). This

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[The] John Howard [Pavilion] houses principally the so-called "criminally insane". Such facilities have, in the past, notoriously rivalled maximum security prisons in the pervasiveness of their restraint upon liberty and the totality of their impositions upon dignity. * * * [C]onfinement in John Howard is not normally contemplated for civilly committed patients and entails extraordinary deprivations of liberty and dignity which make it, in effect, more penitentiary than mental hospital, even if it also provides some treatment.

heightened concern was underscored in *Vitek v. Jones*, 445 U.S. 480 (1980), where the Court rejected the state's argument that transfer from prison to mental hospital was a purely administrative matter (*id.* at 493):

> None of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital. Such consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of crime. Our cases recognize as much and reflect an understanding that involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual (collecting cases).

Here, of course, Respondent is subject to continued confinement in a purported psychiatric facility beyond the expiration of his criminal sentence. *Compare Baxstrom v. Herold*, 383 U.S. 107, 113 (1966). And the linchpin of his claim is that the Washington commitment statute, and its actual implementation at SCC, as applied to him, is punitive and thereby subject to the due process, *ex post facto* and double jeopardy clauses of the Constitution. *Young*, 192 F.3d at 873. The relief he seeks is release from confinement. Habeas corpus, accordingly, is the appropriate vehicle by which to secure the remedy sought.

Habeas Corpus Is An Equitable Remedy With Broad Power To Adopt Such Procedures And Provide Such Relief "As Law And Justice Require"

Both statutes and decisions of this Court have deemed habeas corpus to be "governed by equitable principles" authorizing the federal courts to "dispose of [habeas petitions] ... as law and justice require". 28 U.S.C. §2243. *See also Schlup v. Delo*, 513 U.S. 298, 319 (1995)("Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy"); *Withrow v. Williams*, 507 U.S. 680, 686-87 (1993), *see also id.* at 699-700 (O'Conner, J., concurring in part and dissenting in part)("[c]oncerns for equity ... resonate throughout our habeas jurisprudence"); *McCleskey v. Zant*, 499 U.S. 467, 502 (1991); *Dugger v. Adams*, 489 U.S. 401, 410 (1989).

Indeed, this Court has described habeas corpus as governed less by "statutory developments" than by "a complex and evolving body of equitable principles informed and controlled by historical usage ... and judicial decisions". *McCleskey*, 499 U.S. at 489; *see also Schlup*, 513 U.S. at 319 n.35 ("This Court has repeatedly noted the interplay between statutory language and judicially managed equitable considerations in the development of habeas corpus jurisprudence (collecting quotations and citations)"); *Brecht v. Abrahamson*, 507 U.S. 619, 631-33 (1993)(Court has, where necessary, "filled the gaps of the habeas corpus statute").

To that end, "[t]he very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected" (*Harris v. Nelson*, 394 U.S. 286, 291 (1969)), and that preclusive doctrines and formalities "yield to the imperative of correcting ... fundamentally unjust incarceration". *Engle v. Isaac*, 456

U.S. 107, 135 (1982). *See also Harris*, 394 U.S. at 291 (habeas corpus review affords federal courts the "ability to cut through barriers of form and procedural rules").

Even when procedures are contemplated that are novel or out of the ordinary (e.g., discovery), the federal courts, by statutory authorization and rules, have the power to "dispose of the matter as law and justice require". 28 U.S.C. §2243. *See also Hilton v. Braunskill*, 481 U.S. 770, 775 (1987)("Even in 1894 ... the Court interpreted the predecessor of §2243 as vesting federal courts 'with the largest power to control and direct the form of judgment to be entered in cases brought before it on *habeas corpus*'" [citing *In Re Bonner*, 151 U.S. 242, 261-62 (1894)]).[3]

Only recently, this Court had occasion to underscore that both the procedures by which habeas petitions were to be litigated, as well as the relief ultimately fashioned, must be of sufficient flexibility that the relevant facts are adequately developed in adjudicating the merits of the claim. In *Bracy v. Gramley*, 520 U.S. 899 (1997), the Court unanimously remanded for a full evidentiary hearing where it was confronted with colorably meritorious claims of judicial corruption in connection with a state murder conviction (*id.* at 908-09):

> We conclude that petitioner has shown "good cause" for discovery under [Habeas] Rule 6(a). In *Harris [v. Nelson, supra]*, we stated that "[w]here specific allegations before the court show reason to believe

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[3] The "law and justice" language dates back to the 1867 Habeas Corpus Act, Act of Feb. 5, 1867, ch. 28, §1, 14 Stat. 385-86, which was understood to confer judicial authority "of the most comprehensive character ... [that is] impossible to widen ..." *Ex Parte McArdle*, 73 U.S. 318, 325-26 (1867).

Parenthetically, it should be noted that §2243 and its "law and justice" language remain unamended by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

> that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry" 394 U.S. at 300. ... Habeas Corpus Rule 6 is meant to be "consistent" with *Harris*.

Clearly, this case provides a paradigmatic example of the need for flexibility in the adjudication of Respondent's colorably meritorious claims. He has been incarcerated in SCC for nine years under conditions which a federal judge and jury, as well as a special master, have already (and repeatedly) found to be grossly inadequate to provide the necessary therapeutic treatment for which he was ostensibly "civilly" committed. The federal §1983 *Turay* litigation has been ongoing since 1991, and the federal district judge has been compelled to enter repeated contempt orders and sanctions on a multiplicity of occasions. The Washington Supreme Court has refused repeatedly to order the State to ameliorate the treatment conditions at SCC as recently as 1999, leaving Respondent and other SCC residents to their remedies in federal court. *See Campbell*, 986 P.2d at 775-76; *Turay*, 986 P.2d at 802-04, 809-13.

Given the lengthy development of the factual record that has already taken place in the federal *Turay* litigation, the Court of Appeals' remand for an evidentiary hearing in this case (192 F.3d at 873-76) will hardly impose an unmanageable burden either on the State or Respondent. More to the point, and as discussed *infra*, the federal judge exercising habeas jurisdiction over this case may have far broader remedial and equitable powers at his disposal than does the judge hearing the §1983 action. Quite simply, the habeas judge possesses the remedial authority to impose a variety of equitable remedies, including Respondent's release from custody. *See, e.g., Levine v. Torvik*, 986 F.2d 1506, 1520 (6th Cir. 1993)(civilly committed mental patient

ordered released subject to conditions imposed by federal court with respect to outpatient therapy); *Phifer v. Warden*, 53 F.3d 859, 864-65 (7th Cir. 1995)("Conditional orders are essentially accomodations to the state. They represent a district court's holding that constitutional infirmity justifies petitioner's release. The conditional nature of the order provides the state with a window of time within which it might cure the constitutional error. Failure to cure that error, however, justifies the district court's release of the petitioner.").[4]

Habeas Corpus Is The Only Federal Remedy That Affords Complete Relief, Given Limitations Recently Imposed In §1983 Prisoner Proceedings

The State argues that habeas corpus is an inappropriate remedy in this context, suggesting that Respondent be limited to a civil rights action under 42 U.S.C. §1983. Pet. Br. 31-33; *Amici* States Br. 13-16. This is disingenuous in the extreme, particularly in light of Congressional and judicial actions which only recently have placed substantial restrictions on the remedial powers of the federal courts with regard to state prisoner litigation. *See, e.g.*, the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321-66 to 1321-77 (1995). *See also Miller v. French*, 2000 WL 775572 (U.S. June 19, 2000); *Heck v. Humphrey*, 512 U.S. 477 (1994).

On their face, the federal habeas corpus and civil rights statutes authorize overlapping procedural vehicles by which prisoners may interpose constitutional challenges to state action resulting in conviction, commitment, sentence or other official confinement. However, in *Heck v. Humphrey*,

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[4] *See also* Note, *The Nascent Right To Treatment*, 53 Va. L. Rev. 1134, 1157-59 (1967)(habeas corpus appropriate remedy to address failure to provide adequate psychiatric care, citing, *inter alia*, *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966) and *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966)).

the Court narrowed §1983 actions by making habeas corpus the "exclusive federal remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of 1983". 512 U.S. at 481.

Heck has thus substantially expanded the range of claims that, although potentially covered by both remedies, are understood by the Court to be cognizable only in habeas corpus. Under *Heck*, then, habeas corpus becomes the exclusive remedy for all prisoner claims – including claims seeking damages and injunctive relief -- that "call into question the lawfulness of conviction or sentence." *Id.* at 482-83. In effect, *Heck* extends the *Preiser* rule by making those prisoner claims otherwise subject to overlapping jurisdiction now cognizable only in habeas corpus.

Here, Respondent seeks release from custody because of the punitive nature of his confinement in a state psychiatric facility located on the grounds of a state prison. This continued punitive confinement after the expiration of his criminal sentence raises serious double jeopardy and *ex post facto* concerns, particularly in light of the State's intransigence, after nine years of civil litigation, to provide a properly "therapeutic" milieu for the residents involuntarily incarcerated there. *Cf. Baxstrom v. Herold*, 383 U.S. 107 (1966). Release from further confinement clearly is at the core of the relief he seeks, even where the challenge is framed as an attack on the punitive conditions of his confinement. *Covington v. Harris*, 419 F.2d at 622 & n.11.

Moreover, accepting the State's invitation to eliminate habeas corpus as a viable federal remedy in this case would run the serious risk of divesting the federal courts of substantial equitable authority in the conduct of state prisoner litigation and the fashioning of appropriate relief. Only last Term, in *Miller v. French*, *supra*, this Court upheld Congressionally-imposed limitations prohibiting the

federal courts from exercising their equitable authority to suspend operation of the automatic stay provisions of the PLRA. The PLRA sets forth standards for the entry and termination of prospective relief in civil actions challenging conditions at state prison facilities. Among the Act's provisions are those providing for the "immediate termination" of prospective relief that in the opinion of either party is not "narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. §3626(b). Indeed, in April 1998, all pre-PLRA prison decrees became subject to periodic motions for termination. *See* Brief for the United States at 3, *Miller v. French, 2000 WL 775572 (U.S. 2000)* (Nos. 99-224 and 99-582).

More to the point, under the PLRA's provisions, the mere filing of a stay application by a State defendant triggers an automatic stay provision that federal district judges are powerless either to extend or enjoin. As noted by Justice O'Connor, writing for the majority, "curbing the equitable discretion of district courts was one of PLRA's principal objectives". *Miller, supra*, at *8 & *14.

The long range impact of the PLRA on federal litigation of state prison conditions cases, of course, remains to be seen. Two preliminary observations, however, are properly in order. First, the PLRA provides State defendants with a ready-made procedural vehicle by which to further limit and delay the expeditious imposition of federal remedies at state prison institutions. (In this case, for example, the *Turay* federal litigation, the State's continued recalcitrance, as manifested by repeated contempt citations and the imposition of sanctions -- and Respondent's "therapeutic" incarceration -- all have been going on unabated since 1991.)

Second, and more important, the PLRA will have no appreciable impact on the federal courts' exercise of their habeas jurisdiction or their equitable authority thereunder.

Indeed, the analogous mandatory time limitations imposed on federal habeas courts by AEDPA (28 U.S.C. §2266(b) & (c)) have no application in noncapital habeas cases such as the proceedings at bar. *See Lindh v. Murphy*, 521 U.S. 320, 326-30 (1997)(comparing time-limitation provisions of Ch. 154 (capital habeas cases) with the absence of such limitations in Ch. 153 (noncapital habeas cases)).

Accordingly, federal habeas corpus has emerged from both the PLRA and AEDPA with its equitable discretion relatively intact. The statutory (and equitable) limitations that Congress has now imposed on the federal district courts in state prisoner §1983 litigation will not impair habeas courts' ability to properly fashion swift and efficacious remedies where warranted -- "as law and justice require". 28 U.S.C. §2243.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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